TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 358.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED AUGUST 3, 1906.

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1 UNITED STATES OF AMERICA.

In the Supreme Court of the United States.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } In error to Supreme Court of the Philippine Islands.

Proceedings had in Court of First Instance of the province of Iloilo, Philippine Islands and the Supreme Court of the Philippine Islands.

THE UNITED STATES
vs.
HOMER E. GRAFTON.

Be it remembered that heretofore, to wit, on the 28th day of November, 1904, in the Court of First Instance of the province of Iloilo, came one Ruperto Mantinola, prosecuting attorney of the province of Iloilo, and filed in the clerk's office of said court an information or complaint signed by the aforesaid Ruperto Mantinola, prosecuting attorney, against Homer E. Grafton, which said information in words and figures following, to wit:

THE UNITED STATES
vs.
HOMER E. GRAFTON. } Complaint.

The subscriber accuses Homer E. Grafton of the crime of
2 assassination, committed in the manner following: That on the 24th of July, 1904, and in the barrio of Santo Rosario, within the jurisdiction of the municipality of Buena Vista, Guimaras Island, province of Iloilo, Philippine Islands, the said accused, with illegal intention and maliciously and without justification and with treachery and deliberate premeditation killed Felix Villanueva in the manner following: That on said day and in said barrio the said accused, Homer E. Grafton, with the rifle that he carried at the time, known as the United States magazine rifle c. .30, fired a shot directly at Felix Villanueva, causing with said shot a serious and necessarily fatal wound, and in consequence of said wound the aforesaid Felix Villanueva died immediately after the infliction thereof, in violation of the law.

Iloilo, P. I., November 28, 1904.

RUPERTO MANTINOLA,
Prosecuting Attorney.

Witnesses:

Gaudioso Palacios,
Macario Oro, } Residing at Santo Rosario.

Ambrosio Lucban,
Rafael Icasama, } Buena Vista.

W. Llynch, justice of the peace, Iloilo.

Afterwards, to wit, November 30th, 1904, the case was called for trial in the Court of 1st Instance for the province of Iloilo, 9th Judicial District, Philippine Islands, before his honor, Judge Henry C. Bates, and the accused interposed a demurrer to the jurisdiction of the court and also a special plea in bar, of former jeopardy, in words and figures following:

In the Court of First Instance for the province of Iloilo, island of Panay, Philippine Islands.

THE UNITED STATES
vs.
HOMER E. GRAFTON, PRIVATE
Co. "G," 12th U. S. Infantry.

The accused, Homer E. Grafton, demurs to the indictment upon the following grounds:

3 The Court of First Instance has no jurisdiction to try the accused for the offense alleged in the indictment for that the acts constituting the alleged offense were done and committed within the limits of Camp Jossman, a military reservation of the United States, and by a soldier duly enlisted in the Army of the United States, in the line of duty, all of which appears in the record of his former trial by a military court, duly convened by competent authority, and having exclusive jurisdiction of offenses committed within the limits of said reservation; and the order of the President of Sept. 1st, 1903, copies of the judgement of said court, and said order of the President are submitted herewith.

2. The Courts of First Instance of the Philippine Islands have no jurisdiction of the persons of officers or enlisted men of the United States Army for alleged offenses committed in the performance of military duty.

3. Courts of First Instance are not constitutional courts as contemplated by the 3rd Article of the Constitution of the United States, and hence are without jurisdiction to try causes of which the constitutional courts have exclusive jurisdiction.

4. The courts of the Philippine Islands can not deprive the accused of his constitutional privilege of trial by jury.

5. The accused denies the right of the court other than a military tribunal, constituted by the authority of the U. S., to try him upon an indictment which has not been found or presented by a grand jury.

4 6. If the court holds that it has jurisdiction in this case, the accused, as a special plea in bar of these proceedings, submits herewith a duly certified copy of the judgment of a general court-martial, duly convened by Special Orders, No. 152, dated Headquarters Department of the Visayas, Iloilo, Panay, Philippine Islands, August 1, 1904, at Camp Jossman, Guimaras, Philippine Islands, showing that he has heretofore been tried for and acquitted

of the identical offense alleged in the indictment, as by the record thereof more fully and at large appears, which said judgment still remains in full force and effect and not in the least reversed or made void.

HOMER E. GRAFTON.

Sworn to as to all facts set forth in the plea to the jurisdiction before me this Nov. 30, 1904.

CLARENCE S. NETTLES,
Capt. & Actg. Jdg. Adv., U. S. A.

CASE I.

Proceedings of a general court-martial which convened at Camp Jossman, Guimaras, P. I., pursuant to the following order:

HEADQUARTERS DEPARTMENT OF THE VISAYAS,
Iloilo, Panay, Philippine Islands, August 1st, 1904.

SPECIAL ORDERS, No. 152.

1. A general court-martial is hereby appointed to meet at Camp Jossman, Guimaras, at 10 o'clock a. m., on Monday, August 15th, 1904, for the trial of such persons as may be properly brought before it:

Detail for the court:
Colonel John W. Bubb, 12th Infantry.
Lieutenant-Colonel H. S. Foster, 12th Infantry.
Major P. R. Egan, surgeon, U. S. Army.
Major P. G. Wood, 12th Infantry.
Major G. S. Young, 18th Infantry.
Major D. L. Howell, 18th Infantry.
Major G. W. McIver, 4th Infantry.
Capt. W. J. Pardee, 12th Infantry.
Captain G. H. Davis, 12th Infantry.
Captain F. S. Hutton, 12th Infantry.
Captain A. T. Smith, 12th Infantry.
Capt. F. D. Wickham, 12th Infantry.
Captain M. N. Falls, 12th Infantry.

Captain R. L. Hirst, adjutant 12th Infantry, judge-advocate.

5 Should any member of the court be absent the court will proceed with the business before it, provided the court is not reduced below the minimum provided by law. Upon the adjournment of the court sine die the officers named will return to their proper stations.

The travel enjoined is necessary for the public service.

By command of Brigadier-General Carter:

(Signed) D. A. FREDERICK,
Major, Assistant Adjutant-General.

HEADQUARTERS DEPARTMENT OF THE VISAYAS,
Iloilo, Panay, P. I., August 6, 1904.

SPECIAL ORDERS, No. 155.

3. Capt. F. S. Hutton, 12th Infantry, is hereby relieved as a member and detailed as judge-advocate of the general court-martial convened at Camp Jossman, Guimaras, P. I., per par. 1, Special Orders, No. 152, current series, these headquarters, relieving Captain R. L. Hirst, 12th Infantry, judge-advocate, to enable him to comply with telegraphic instructions from Headquarters Philippines Division to proceed at once to the United States.

By command of Brigadier-General Carter:

(Signed) D. A. FREDERICK,
Major, Assistant Adjutnat-General,
Adjutant-General.

CAMP JOSSMAN,
Guimaras, P. I., August 15th, 1904.

The court met pursuant to the foregoing order at 10 o'clock a. m.

Present:

Colonel John W. Bubb, 12th Infantry.
Lieutenant-Colonel H. S. Foster, 12th Infantry.
Major P. G. Wood, 12th Infantry.
Major G. W. McIver, 4th Infantry.
Captain W. J. Pardee, 12th Infantry.
Capt. G. H. Davis, 12th Infantry.
Captain A. T. Smith, 12th Infantry.
Captain F. D. Wickham, 12th Infantry.
Captain M. N. Falls, 12th Infantry.
Captain F. S. Hutton, 12th Infantry, judge-advocate.

Absent:

Major P. R. Egan, surgeon, U. S. Army.
Major G. S. Young, 18th Infantry.
Major D. L. Howell, 18th Infantry.

The above members could not reach Camp Jossman on account of nonarrival of the steamer on which they had started.

The judge-advocate announced that the department commander had requested that the court would not proceed to the trial of
6 any cases before it until the arrival of the boat bringing the other members.

The court at 10:15 a. m. adjourned, awaiting the arrival of the other members and to meet at the call of the president.

(Signed) F. S. HUTTON,
Capt. 12th Infantry, Judge-Advocate.

CAMP JOSSMAN,
Guimaras, P. I., August 16, 1904.

The court met pursuant to the call of the president at 1:30 o'clock p. m.

Present:

Colonel John W. Bubb, 12th Infantry.
Lieutenant Colonel H. S. Foster, 12th Infantry.
Major P. R. Egan, Surgeon, U. S. Army.
Major P. G. Wood, 12th Infantry.
Major G. S. Young, 18th Infantry.
Major D. L. Howell, 18th Infantry.
Major G. W. McIver, 4th Infantry.
Captain W. J. Pardee, 12th Infantry.
Captain G. H. Davis, 12th Infantry.
Captain A. T. Smith, 12th Infantry.
Captain F. D. Wickham, 12th Infantry.
Captain M. N. Falls, 12th Infantry.
Captain F. S. Hutton, 12th Infantry, judge-advocate.

The court then proceeded to the trial of Private Homer E. Grafton, Co. G, 12th Infantry, who having been brought before the court, introduced 1st Lieutenant G. H. Shields, jr., 12th Infantry, as counsel.

Ruel E. Sherwood was duly sworn as reporter.

The order convening the court and the order modifying the detail were read to the accused and he was asked if he objected to being tried by any member present named therein, to which he replied in the negative.

The members of the court and the judge-advocate were then duly sworn.

The accused was then arraigned upon the following charge and specifications:

Charge: Violation of the 62nd Article of War:

Specification I. "In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, wilfully, and feloniously kill Florentino Castro, a Philippino, by shooting him with a U. S. magazine rifle, calibre .30."

"This at Buenavista Landing, Guimaras, P. I., July 24th, 1904."

7 Specification II. In that Private Homer E. Grafton, Co. G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Felix Villanueva, a Philippino, by shooting him with a U. S. magazine rifle, caliber .30.

This at Buenavista Landing, Guimaras, P. I., July 24th, 1904.

To which the accused pleads as follows:

To the 1st specification, "Not guilty."

To the 2nd specification, "Not guilty."

To the charge, "Not guilty."

The counsel for the accused then read the following admission, which was signed and hereto appended, marked "Ex. A."

I admit that on July 24th, 1904, I was a member of a detachment of Company G, 12th Infantry, on duty at Buenavista Landing, Guimaras, P. I.; that on July 24th, 1904, I was regularly detailed on guard and was a member of the first relief. That I was on post between the hours of 2:00 and 4:00 p. m. In the execution of my duty I shot two male Philippinos with a U. S. magazine rifle, caliber .30.

(Signed) HOMER E. GRAFTON,
Private Co. G, 12th Infantry.

Findings of the court:
Of the 1st specification, "Not guilty."
Of the 2nd specification, "Not guilty."
Of the charge, "Not guilty."

The court does therefore acquit him, Private Homer E. Grafton, Company G, 12th Infantry.

The judge-advocate and the reporter were then recalled, and the court, at 10:55 a. m., took a recess until 11:00 a. m., at which hour the members of the court, the judge-advocate, and the reporter resumed their seats, and the court then adjourned until 1:30 p. m., August 17, 1904.

(Signed) JNO. W. BUBB,
Colonel 12th Infantry, President.
(Signed) F. S. HUTTON,
Captain, 12th Infantry, Judge-Advocate.

A true copy of the orders, pleas, and findings.
CLARENCE S. NETTLES,
Capt. & Actg. Judge-Advocate, U. S. A.,
J. A., Department of the Visayas.

HEADQUARTERS DEPARTMENT OF THE VISAYAS,
Iloilo, Panay, Philippine Islands, August 25, 1904.

8 In the foregoing case of Private Homer E. Grafton, Co. G, 12th U. S. Infantry, the acquittal is approved. Private Grafton will be released from confinement and restored to duty.

(Signed) WILLIAM H. CARTER,
Brigadier-General, United States Army, Commanding.

A true copy:
CLARENCE S. NETTLES,
Captain & Acting Judge-Advocate, U. S. A.,
Judge-Advocate, Department of the Visayas.

HEADQUARTERS DEPARTMENT OF THE VISAYAS,
Iloilo, Panay, P. I.

SPECIAL ORDERS,
No. 167.

[Extract.]

4. Private Homer E. Grafton, Company G, 12th United States Infantry, having been tried by a general court-martial convened at

Camp Jossman, Guimaras, P. I., and found not guilty of manslaughter, in violation of the 62nd article of war, was acquitted.

In the foregoing case the acquittal is approved. Private Grafton will be released from confinement and restored to duty.

By command of Brigadier-General Carter:

D. A. FREDERICK,
Major, Assistant Adjutant-General, Adjutant-General.

Afterwards, to wit, on the third day of December, 1904, the following decision, overruling the demurrer and plea of the defendant, was rendered by his honor, Judge Henry C. Bates, to wit:

UNITED STATES OF AMERICA,
Philippine Islands.

In the court of first instance, province of Iloilo, ninth judicial district.

THE UNITED STATES
vs.
HOMER E. GRAFTON.

Decision on motion and demurrer to indictment interposed by defendant.

In the case of Homer E. Grafton, accused of assassination, in which a demurrer to the indictment was interposed, and also a plea in bar, of former jeopardy, I shall not at this time attempt to enlarge
9 upon the reasons for the conclusions I have come to, but simply state those conclusions. It has been a very interesting question, and it has been ably handled by both sides, and many authorities cited; and an opinion upon a matter of that kind, to make it creditable to anybody, would necessarily consume much more time since the hearing than I have had to devote to it, and I do not think it would have been of any particular value, either in the case, or anywhere else.

The statement of the facts: First, I shall find to the effect that this defendant was a soldier; that he was on duty at the time that this offense occurred, and that the point where he was on duty and where the offense occurred was within a military reservation in Guimaras. Upon that question the evidence may be sent up with the case.

I think the first plea to the jurisdiction of the court must, necessarily, be overruled; that is, the substance of the demurrer that this court has not jurisdiction—that is, a general challenge of the jurisdiction of the court. It is coupled with the proposition that this man was a soldier, and was on duty in the military reservation; but I think under the authorities that have been cited, and under the

law that has been passed by Congress constituting this court, that it has the same jurisdiction in matters of this kind that the Federal courts at home have over offenses committed upon a military reservation.

Without enlarging upon the other plea, the plea in jeopardy, I am of opinion that that can not be sustained. I think it is hardly the same offense. This is a complaint for assassination. The proceedings by which he was tried under the direction of the commanding general of this division charge as an offence the breach of the 62nd article of war. They do not charge assassination. The right in time of peace of a military court to take cognizance of these graver offenses is distinctly denied, as I understand it, by inference in that provision which gives them, in time of war, jurisdiction over those cases. I do not think that under present conditions they had authority to try this man for assassination, which is murder in the first degree, and I do not think that the breach of the 62nd article of war, puts this man in jeopardy for the breach of the 62nd article of war, puts this man in jeopardy for crime he is charged with in this complaint.

But, without enlarging upon that matter, I will overrule that plea, of course with the expectation that the matter will be determined by the higher court, and will make a full statement of all the facts and all the claims, so as to present it to the Supreme Court with the utmost fairness to both sides.

So the plea and the demurrer are overruled, and the defendant is ordered to answer further, by pleading to the merits.

HENRY C. BATES,
Judge, Court of 1st Instance for the Ninth Judicial District, Iloilo, P. I.

Iloilo, Panay, P. I. This 3rd day of December, 1904.

Thereupon upon the 3rd day of December, 1904, the defendant was ordered to answer further by pleading to the merits, whereupon he pleaded "Not guilty."

Afterward the following testimony was taken during the 6th, 7th, and 8th of December, 1904:

UNITED STATES OF AMERICA,
Philippine Islands.

Court of First Instance, Province of Iloilo.

UNITED STATES
vs.
HOMER E. GRAFTON. } Case No. 248 and 249.

Case called for trial November 30th, 1904, before Judge Henry C. Bates.

Mr. Jas. Ross, supervisor of fiscals and Mr. Ruperto Montinola,

provincial fiscal, appeared for the Government, and Captain Nettles and Lieutenant Shields appeared for the defendant.

11 Complaint is read to the defendant. Captain Nettles makes a motion to quash the indictment, upon the ground that the court has not jurisdiction. Motion is overruled. Captain Nettles changes form of his motion so as to make it read demurrer. In connection with the demurrer Captain Nettles offers a map, marked "1," which is a map of Camp Jossman, including the reservation at the dock. Mr. Ross objects to the admission of the map, for the reason it is not the best evidence as to whether or not the land purported to be described in said map is or is not a military reservation. And further that the title would be the best evidence.

Mr. Nettles asks for a few minutes to produce his titles. Captain Nettles asks to have Capt. C. H. MARTIN sworn, which is done.

Questions by Captain NETTLES:

Q. Please state your official position and duties at this post.

A. I am chief quartermaster, Department of Visayas, station Iloilo, Panay.

Q. Is the island of Guimaras within the limits of the Division of Visayas?

A. It is.

Q. What is this paper I hand you?

A. This is a lease of that portion at the Camp Jossman Landing and dock which belonged to John Bordman, jr., the owner of the land when the President decided it was a military reservation.

Captain NETTLES. I offer this paper in evidence.

Mr. Ross. We object to the admission of this paper, because it is not executed as required by law, and it is not registered in the manner required by the law. It is not the best evidence of the fact sought to be established, namely, that the land on which the alleged offense was committed is a military reservation.

12 The COURT. What is the fault of the execution of it?

Mr. Ross. It is not recorded by law, also it has not been registered.

(Captain Nettles reads the document to the court.)

The COURT. I think this document will have to be admitted in evidence for what it is worth. Whether that document shall itself establish this as a military reservation is a question not determined by merely admitting the document; accordingly the objection is overruled and the document is admitted.

Captain Nettles calls General WILLIAM H. CARTER, who, after being duly sworn, testified as follows:

Questions by Captain NETTLES:

Q. Will ask you who is the department commander of the Department of Visayas, P. I.?

A. I command the Department of Visayas, under order of the President of the United States.

Q. Is the island of Guimaras included within the limits of this department?

A. Yes.

Q. What rules and regulations have you prescribed, if any, relative to the military reservation at Camp Jossman; is it what is known as Guimaras Island?

Mr. Ross. Object to the question as immaterial and irrelevant. Rules of the commanding general can have no weight as to whether or not it is a military reservation.

The COURT. I do not very clearly see the materiality of the question. It may be that some new light will be given that will be material, but there does not exist anything that seems material in my mind, unless it is that they are in actual possession of the land.

Captain NETTLES. Question withdrawn. That disposes of the evidence I have to offer that that is a military reservation, so far as the demurrer goes. I now wish to introduce affidavit of General Carter in connection with the special plea involved.

13 Mr. Ross. Object to the admission of this affidavit, upon the ground it states an opinion of law, which is not admissible. We further object for the reason the document contains the following statement: "At the time the civil authorities declined to take jurisdiction." That is entirely irrelevant and immaterial.

The COURT. I think an affidavit of that character is not the best evidence where the witness could be brought into court to testify. It certainly could not be received against the defendant, because he would have the right to be confronted with the witness, and I do not think it can be received in his favor, because the Government has the right to cross-examine. I think it would be better to have General Carter called here to testify.

Captain NETTLES. I am perfectly willing to put the General on the stand as to those facts.

General CARTER takes the stand again.

Q. When you were informed of the commission of the offense alleged against the accused in this court, it being alleged here that he assassinated Felix Villanueva, please state what steps you took, if any, as department commander, in relation to the trial of the accused for the said offense, to what jurisdiction was he offered if any.

Mr. Ross. Object to the question as irrelevant and immaterial.

The COURT. It may be received subject to your objection.

A. I was on a launch the day the offense was committed and learned of it at Camp Jossman dock about two hours later from the judge-advocate, Major Dodds. I directed a report to be made by the commanding officer at Camp Jossman, and upon receipt of that I told them not to order a court-martial until I had offered to submit the case to the court of the 1st instance. I sent the judge-advocate to Judge McCabe, then presiding in this court, directing him to

14 make the statement I have just made to Judge McCabe and return and report to me.

Mr. Ross. We object to the witness stating what Major Dodds reported to him, on the ground it is hearsay, and on the further ground it would be incompetent to show any judicial action by Judge McCabe.

The COURT. I think this report Major Dodds made to General Carter will have to be excluded, upon the ground it is hearsay. Now I think the General may state what he did in consequences of the report made to him, without stating what the report was.

A. (General CARTER.) I took the matter into very deep consideration. I believed the jurisdiction rested in the court to be ordered by me, but as a matter of courtesy I laid it before the civil authorities; I directed a court-martial to assemble at Camp Jossman, consisting of the required number of officers for the trial of the case, and took the precaution to order members of that court from other posts in order to have a fair trial of the case, without prejudice.

Captain NETTLES. I now offer certified copy of the judgement of the court-martial.

Mr. Ross. The only objection we have to offer is that the court-martial did not have jurisdiction to try the defendant for the offence with which he is charged.

The COURT. Objection overruled.

Captain NETTLES. Offer General Order 34 of the War Department as evidence, and same is marked "5" for identification.

Mr. Ross. The Government objects to the admission of this document in evidence for the purpose of establishing the fact that the land on which the offence was committed is a military reservation, for the reason it has not been shown that the conditions contained in said document "5" have been complied with by the military authorities.

15 The COURT. It may be received for what it is worth.

Captain NETTLES. We are through with preliminaries.

Mr. Ross asks to be sworn, which is done, and he testified as follows:

I will state I was in Iloilo in the month of July, this year, and that upon the 25th of July, having been informed that one Homer E. Grafton had shot two Filipinos in the island of Guimaras, I proceeded in my official capacity to file with the justice of the peace, city of Iloilo, a complaint charging said Homer E. Grafton with the crime of assassination. That upon that complaint the document, "Exhibit A," was issued, being an order of arrest, signed by Willis Lynch, justice of the peace, Iloilo. Later on, the order of arrest having been returned by the sheriff with return which appears thereon, I caused another order of arrest to be issued by said justice of the peace, on August 28th, 1904. Still later, I do not remember the date, the last order of arrest not having been complied with, I filed a sworn complaint in the court of first instance, upon which order of arrest was issued. That is all I wish to say.

Captain Nettles asks that the matter of jurisdiction of this court be carried to higher court before the accused pleads to the merits of the case.

The COURT. The motion made by Captain Nettles is overruled and the defendant is ordered to plead. The motion is overruled as a matter of law, not as a matter of discretion. It is the opinion of this court that this case must be finished by final judgment before any part can go to the Supreme Court under the new method of procedure. Of course it will not be necessary for it to go at all, if the defendant is acquitted.

The defendant pleaded "Not guilty."

UNITED STATES OF AMERICA,
Philippine Islands.

Court of First Instance, province of Iloilo.

16 UNITED STATES, *vs.* HOMER E. GRAFTON. } Case No. 248.

AMBROSIO ARBIDALLA, witness called by the Government, after being duly sworn, testified as follows:

Questions by Mr. MONTINOLA:

Q. What was your occupation in July of this year in Guimaras?

A. Working for the quartermaster's.

(It is agreed in open court that the record in this case shall go to the Supreme Court, if such is necessary, in English.)

Q. Since when have you been working for the quartermaster's in Guimaras?

A. I was employed there in March.

Q. In what month did you quit working for the quartermaster's in Guimaras?

A. Last month.

Q. Did you know Felix Villanueva?

A. Yes.

(At this point Lieutenant Shields is admitted as assistant attorney for the defendant.)

Q. What were your relations with Felix Villanueva?

A. He worked with me for the quartermaster's.

Q. Do you know since when he had been employed in the quartermaster's department?

A. He had been working a long time for them, and was working for them at the time I go there.

Q. What happened to Felix in July of this year at Guimaras?

A. When Felix left the dock with Florentino to go and get some bamboo poles and had arrived near the coal pile, at a place between

the two storehouses, we saw from the place where we were standing, which was near the coal pile, that a soldier was pointing his gun at them. Felix got off of the road he had been following, and when he got off of the road the soldier kept pointing the rifle at him and then shot him. The first shot did not hit Felix, but the second one did.

Question (By the COURT.) Did you see that?

A. Yes.

17 Q. At what distance was Felix from the soldier when the soldier fired the shot at him?

A. More than 40 brazas.

Q. Is this distance of 40 brasas, which you refer to, the distance between you and Felix, or the distance between the soldier and Felix?

A. It was the distance between Felix and I.

Q. How far was Felix from the soldier?

A. About 4 brazas.

Q. On what part of the road when the soldier fired the shot at him?

A. Felix was alongside of the storehouse and the sentry was standing in the middle of the road.

Q. Show the court in what position Felix was in at the time he was shot by the soldier.

A. When the first shot was fired at Felix he ducked down [indicating position], and when he was about to get up and run away is when he was hit by the second shot.

Q. Was he near the camarines on either side of the road?

A. Just at the corner of one of the storehouses.

Q. Where was Florentino when the sentry fired the shot at Felix?

A. Standing in the center of the street.

Q. How far was Florentino from the sentry?

A. 4½ brazas.

Q. Show to the court the positions respectively of the soldier, Felix Villanueva and Florentino, supposing both of these walls to be the respective walls to the storehouses

A. [Witness indicates position as desired.] Florentino and Felix were coming from the dock. As soon as Felix saw the soldier raise the gun, he walked over by the side of the camarine a distance of 25 feet from the soldier, and he was at that point when the soldier fired the first shot. When Felix left Florentino to go to the side of the storehouse he was looking at the soldier, and when the soldier

18 fired the first shot he ducked down. The first shot did not hit him.

Q. Who was with you?

A. Macario.

Q. What did Felix do after the soldier fired the two shots at him?

A. After the sentry had fired at Felix he also fired at Florentino, and then we started to run towards the beach.

Q. How many shots were fired in all?

A. Three.

Q. What had Felix and Florentino been doing at the dock before they left it?

A. Making checker boards.

Q. With what instrument were they making these boards?

A. A knife.

Q. What was the occupation of Felix in the quartermaster's department?

A. A boatman.

Q. Why was Felix on the dock that day?

A. He was awaiting for the steamer "Liscum."

Q. And after the checker board had been finished what did Felix do?

A. He played checkers with Florentino. Then they left.

Q. Where did Felix carry the knife when they left?

A. In his hands, cleaning his finger nails with it.

Q. Describe the knife?

A. About 10 inches long—that is, all of it, including handle.

Q. Would you recognize the knife if you saw it?

A. Yes.

Q. [Showing witness knife.] Is that the knife?

A. Yes.

Mr. Ross. Now offer as evidence the knife identified.

The COURT. Same is received.

Q. What did Felix have on besides the knife?

A. Nothing.

Q. What was Florentino carrying on that occasion at the time he and Felix left the dock?

A. Nothing.

Q. Do you know where Florentino and Felix were going at the time they left the dock?

19 A. They said they were going to get bamboo poles.

Q. What time in the day did this occur?

A. 2.45 p. m.

Q. Do you know what day of the week it was?

A. Sunday.

Q. Would you recognise the soldier who fired the shots at Felix?

A. I do not believe I would know him; American soldiers all look alike.

Q. How many people were in the street or the immediate vicinity at the time of the firing?

A. There was nobody there but the two deceased, and we came behind.

Q. Is there any military quarters in that vicinity?

A. Soldiers' quarters at a certain distance.

Q. How far are the soldiers' quarters from the storehouses, more or less?

A. 80 or 90 yards.

Mr. MONTINOLA. That is all.

Cross-examination by Captain NETTLES:

Q. At the time the shooting occurred where were you?

A. Along side of the coal pile.

Q. Which side of the coal pile?

A. On the side towards the street.

Q. Were you sitting down or standing up?

A. We were walking behind Felix and Florentino, and when we got to the coal pile Felix crossed the road in order to get out of the way of the soldier, who was pointing his rifle at him.

Q. Then you were with Felix?

A. No; Felix walked ahead and we walked behind.

Q. Who walked behind—who was with you?

A. Macario Obi and myself.

Q. Were you standing still or were you walking at the time the shots were fired.

20 A. We stopped as soon as the first shot was fired, and until the sentry fired at Florentino we had not moved from the place where we had stopped.

Q. What did you stop at the coal pile for?

A. Because we did not know why this man had been shot at.

Q. You have just stated that you stopped before the man was shot; why did you stop?

A. When Felix made the movement trying to get out of the way of the sentry we looked around to see what was going on, and when the shots were fired at Felix the first one did not hit him and he ducked down, and after that Florentino was shot.

Q. You have said a great deal about the shooting. I want to know what you were doing there and where you were going?

A. We were going to the storehouse where they sell cooked rice, because we were hungry.

Q. Who were going there?

A. Macario Obi and myself.

Q. Were you walking along with Felix and Florentino at the time, and how close were you to them?

A. Florentino and Felix were about 40 brazas ahead of us.

(It is agreed between counsel that a braza is about 2 yards, the extent of a man's arms from point to point when stretched out.)

Q. What had you been doing at the dock on that day?

A. We were waiting there for the steamer "Liscum," and when we sighted it we were to notify our superior officer.

Q. Did the steamer come that day?

A. No; it arrived on Monday morning.

Q. Were you in the middle of the street or road when this firing occurred, and how close to the coal pile were you?

A. I was 3 yards distant from the coal pile. Macario was alongside of me.

Q. Then I understand you to say you were in the middle of the road.

A. Macario was in the middle of the street and I was a little nearer to the coal pile.

21 Q. Which direction were you facing when the shots were fired?

A. In the direction of the deceased Florentino and Felix.

Q. When the shots were fired what did you do?

A. We were looking ahead when they were fired at Felix, and after Florentino had been shot he fell to the ground and we ran away.

Q. How many shots did you say were fired?

A. Three; two at Felix and one at Florentino.

Q. Where was Felix hit?

A. One bullet went in on top of the left shoulder and came out on the other side, and Florentino was shot in the side.

Q. When and where did you see the dead bodies of these two men?

A. Felix along side of the camarine and Florentino in the middle of the street, and when we saw them lay down we ran away.

Q. Is that the only time you saw the dead bodies of these two men?

A. Yes; because we ran away.

Q. You never saw them after they were there in the street and alongside the camarine?

A. No; when we saw them laying there we ran away.

Q. After you ran away did you ever see the bodies?

A. We again saw them when our foreman ordered us to bury the bodies.

Q. Were they clad in clothes when you saw them and buried them or not?

A. I believe their relatives had clothed them, because they were already in their coffins when we buried them.

Q. Did you examine the wounds on the bodies when you buried them?

A. No.

Q. You at that time were in the employ of the quartermaster's department under Lieut. Harrell, were you not?

A. He was an American lieutenant, but I do not know his name.

Q. (Calling in Lieut. Harrell and Captain Hutton.) Do you know these two men?

A. One is lieut. of the quartermasters [indicating Lieut.

22 Harrell].

Q. Is this the officer under whom you were previously employed at the dock in Guimaras?

A. Yes.

Q. Do you know this other officer?

A. He was in Supong.

Q. Did you ever see this officer at Buena Vista or the landing at Buena Vista?

A. Yes; he came there when he took a boat to come to Iloilo.

Q. I want to know if this captain ever had an interview with you at or near the Guimaras dock in relation to this case.

A. No.

Q. You deny that?

A. I saw this gentleman frequently and I also saw him when he took the statement of Felix Dasa.

The COURT. Ask him if this officer, Captain Hutton, talked with him about the facts of this case.

A. He did not talk to me, but with Felix Dasa.

Q. Where were you at the time this officer talked with Felix Dasa?

A. I was inside of the storehouse, working.

Q. Where was Felix, inside or outside of the storehouse?

A. He was also inside of the camarine, because they had us lined up there.

Q. For what purpose were you lined up?

A. Because the captain asked us about this case, and it was Felix that answered.

Q. Then is it not a fact that all of the quartermaster's employees, including yourself, were lined up for the purpose of getting information as to the facts in this case?

Mr. Ross. Object to this question as immaterial and improper cross-examination.

Capt. NETTLES. It seems to me that it is entirely proper in this line that if this witness was there at the time of the shooting, why did he suppress it when the officers were seeking information.

23 The COURT. I think you need not ask the question, all the benefit has already been derived.

Q. Why did you remain silent when you knew these officers were seeking information from you who knew these facts?

A. We wanted to give our story, but our foreman told us we should go ahead with our work, because Felix Dasa had told about it.

Q. Were you not specifically asked yourself by these officers then or afterwards if you knew anything about the killing of these two Filipinos?

A. No.

Q. Why were you discharged from the quartermaster's employment at Guimaras?

Mr. Ross. I submit this question is improper cross-examination.

The COURT. I do not see what relation it has to the case. I think it is incompetent.

Q. When were you discharged from the employment of the quartermaster's dept.

Mr. Ross. Object to this question as immaterial.

The COURT. I think it may be material.

A. I was discharged November 15th.

Q. How many other soldiers did you see in the vicinity of the soldier that did the shooting at the time of the shooting?

The COURT. He has not said he saw any soldiers. Ask him if he did see any.

Q. Did you see any other soldiers at the time of the shooting by the sentry?

A. We have not seen but one soldier, because on seeing Florentino fall we ran away.

Q. After the shooting did you ever make a report of the fact that you had seen it either to the officials of the military or any officials of the civil government?

No; we ran away.

24 Q. I do not mean the day on which the shooting occurred, but within the next week or two weeks after the shooting, when this matter was being investigated, did you then report to any military or civil official that you knew the facts in this case?

A. No; Macario told the story of what had happened.

The COURT. Where were you during the time? Did you remain there at Guimaras or did you go away?

A. In the forenoon they ordered us to go alongside of the lieutenant's house and bury the bodies.

Q. Did you stay there at Guimaras for three or four weeks?

A. Yes; I continued to work there.

Q. Is it not a fact that you knew an investigation was being made and the facts were being looked for by the officers of the Army in relation to this shooting?

A. I found out about it when Capt. Hutton made inquiries.

Q. Then why did you not tell Capt. Hutton the same story then that you have told this court?

Mr. Ross. Object, as the question is not proper cross-examination.

The COURT. He says he knew Capt. Hutton was investigating, and the question is, "Why did you not tell him the same story you have told here," which gives an inference that he told Capt. Hutton a different story. I think it is proper to ask the witness why he did not inform Capt. Hutton and the authorities about what he knew.

Q. When Capt. Hutton was investigating this case why did you not inform him of the facts you knew about the case?

A. Because Felix Dasa made the report and we wanted to make our report, but our foreman hurried us out to work.

Q. Who is your foreman?

A. Santos; I do not know his surname.

Q. Then why did you not make your report to the justice of the peace or presidente of the town at that time?

Mr. Ross. Object to the question as immaterial and irrel-

25 evant.

The COURT. I think I will allow the question to be answered.

A. Because we were afraid that our chief would get angry with us for the reason we were working for the quartermasters, and besides there was a corporal who should have reported the matter.

Q. When and to whom did you first report your knowledge of the facts in this case?

A. When Corporal Santos asked me about it I told him. He asked me what had happened and I told him.

Q. That is not an answer to my question.

The COURT. I think that is a substantial answer; you can modify it if you wish.

Q. What official of the Government did you first report this to, and when?

A. Macario reported the matter to the vice-presidente.

Q. I am not asking you what Macario did; I am asking to what official you reported, and when.

Mr. ROSS. I believe that question is objectionable, in that it assumes he reported the matter to some official.

Q. Did you ever at any time report the facts within your knowledge relative to this occurrence to any official of the Government, either military or civil?

A. Not me, but Macario.

Q. How much time on the day of the occurrence to which you have been referring did you spend at the dock on that day?

A. From 8 in the morning, when the steamer "Boordne" left, until 2 o'clock in the afternoon, when our foreman told us to leave.

Q. Then were you there at the time of a bolo fight between two natives in the morning about 11 o'clock?

A. Yes; the deceased Felix had a fight with one of the employees in the casco.

Q. About what time was that fight?

A. About 10 o'clock; I was lying down in the storehouse
26 when they got into a hand-to-hand fight.

Q. Who went and got the sentinel to stop that fight?

Mr. ROSS. It seems that they are going into the trial of another case. I do not see the bearing of this testimony in this case.

Mr. NETTLES. I think it is material in that it is to show that there was a fight there at the dock that morning and the sentry was called in to stop it, and it might show some motive for an attack on the sentry.

The COURT. I do not think it would have any bearing unless you are going to show it was Homer E. Grafton who was the sentry called in to stop the fight. If you wish to show this fact, you can do so, but not go into the story. Make your offer specifically. What do you expect to show?

Capt. NETTLES. That would require me to advise the prosecution of certain matters of defense that I do not care to now.

The COURT. I think the question will have to be excluded.

Q. How much time elapsed between the first and second shots?

A. Time enough to reload the rifle for another shot.

Q. How much time between the second and third shots?

A. As soon as he had fired the second shot, he turned around and fired the third shot at Florentino.

Q. Did the sentry load his piece from his belt?

A. The rifle was loaded. It was a magazine rifle.

Redirect examination by Mr. MONTINOLA:

Q. Did you see Felix Villanueva, before the shot was fired, run towards the sentry?

Captain NETTLES. Object to the question, as it leading.

Mr. MONTINOLA. Withdraw the question.

Q. In what position or attitude did you see Felix just before the sentry fired at him?

A. He was cleaning his finger nails with a knife and walking along the road. Florentino was walking alongside of him.

27 Q. In what position was Felix when the sentry pointed the gun at him?

A. When I saw the sentry he was pointing his gun at Felix and Felix got off the road, but he had the knife in his hand.

Q. In what condition was the knife on that day, was the blade clean, or was it in the same condition it is now in?

A. The blade was black, because Felix always carried it in the boat.

Mr. MONTINOLA. That's all.

R. M. KIRBY SMITH, after being duly sworn testified as follows:

A. I am first lieutenant and assistant surgeon, U. S. Army, stationed at Camp Jossman.

Questions by Mr. Ross:

Q. Will ask you whether or not on July 24th, this year, you were called to the landing place on Guimaras on some official duty?

A. Yes.

Q. What was that duty?

A. I was called to see two natives who had been wounded.

Q. State whether they were this Felix Villanueva and Florentino Castro.

A. I do not know their names.

Q. Were they the men this defendant is accused of killing?

A. Yes.

Q. State to the court what you saw there at the landing place?

A. When I arrived at the quartermaster's storehouse I was informed that there were two natives inside, one of whom was dead and the other seriously wounded. When I entered the storehouse I saw these two natives on the floor. One was dead and I saw the other was seriously wounded. Both had been shot by a rifle. I first examined the wounded man and saw he was seriously

28 wounded. I found the ball had entered on the right side, at a point corresponding to a line drawn 1½ inches from the right nipple extending down about 1½ inches below the free board for the ribs. The ball passed through the body and emerged about three inches to the left of the spinal column and 1 inch below the last rib.

Q. Now please describe the wounds of the man you found already dead.

A. I found on the man dead that the ball entered at the apex of the left shoulder and came out on the right side between the 5th and 6th ribs in the line of exellum.

Q. Are you able to state the cause of that man's death, or if the wound on his body caused his death?

A. Yes.

Q. Did you find any other wounds on the body besides the one you have described?

A. No.

Q. Did you notice whether there was a wound in the right arm?

A. There was none in his right arm.

Q. What kind of a ball was it that caused the wound you described?

A. A rifle ball.

Q. Can you state from your examination whether it was a U. S. rifle caliber .30?

A. I can not.

Q. What was the size of the wound at the point of entrance?

A. Large as a small lead pencil.

Q. The point of exit?

A. Rather jagged.

Q. Believe you stated in your opinion the wound caused the man's death?

A. Yes.

Q. What was the condition of the body with reference to the rigor of death?

A. It had not set in.

Q. Was the body still warm?

29 A. Slightly so.

Q. How long before had the man been shot?

A. I can not say.

Q. What hour did you go there, more or less?

A. I was called in about an hour after the shooting.

Q. The wound upon the other man whom you examined, was it necessarily a mortal wound?

A. The post-mortem showed it was mortal.

Q. What was the condition of the body and clothing of the man already dead when you arrived there as to his having bled freely?

A. I do not remember the exact amount. There was some blood on his clothes.

Q. And the other one, had he bled a great deal?

A. Not very much.

Mr. Ross. That's all.

Cross-examination by Capt. NETTLES:

Q. How came it that you went to the landing to visit these natives?

A. In the capacity of post surgeon.

Q. Then you were called?

A. Yes.

Q. And the wound on the person still alive when you arrived at the dock was slightly downward from right to left?

A. Yes; slightly downward.

Q. What did you do with the wounded native?

A. First gave dressing; then gave stimulants and a hypodermic injection of morphine; had him placed in an ambulance and carried him to the post. Just as the ambulance reached the hospital he drew his last breath.

Q. Did the wounded native make any antemortem statement to you?

A. None at all.

Q. Did you make any effort to get a statement from him?

A. No.

30 Q. Is there any possibility as to your being mistaken as to the side of the entrance of the bullet?

A. No, I am sure it was on the right side.

That's all.

MACARIO ORBE, witness for the Government, after being duly sworn, testified as follows:

Questions by Mr. MONTINOLA:

I am 20 years old, formerly employed by the quartermaster's, but now out of work.

Q. Since when have you been employed by the quartermaster's in Guimaras?

A. More than six months—about one year.

Q. On what date did you quit working for the quartermaster's in Guimaras?

A. This month—December.

Q. Did you know Felix Villanueva?

A. Yes.

Q. Where did you become acquainted with him?

Q. In the place where we worked.

Q. What was Felix doing there?

A. Boatman.

Q. Do you know what happened to Felix on or about July 24th of this year?

A. Yes; he was a boatman and always carried a knife for cutting ropes.

Q. Where was he on July 24th of this year?

A. On the dock, together with me.

Q. What was he doing on the dock?

A. Waiting for the arrival of the transport, which was expected to come in.

Q. What time did Felix go home?

A. About 2.30 p. m.

Q. What happened to Felix when he was going home at that time?

A. When he left the dock he carried a knife, with which he was cutting his finger nails.

31 Q. What was Felix doing there?

A. They came from the dock in order to go and get some bamboo pieces, and when the sentry saw——

(Interrupted by attorney.)

Q. Where were you when Felix was shot by the sentry?

A. Walking behind Felix and Florentino.

Q. Who was with you?

A. Ambrosio, the other witness.

Q. So this man was your companion [indicating Ambrosio]?

A. Yes.

Q. In what part of the road were you and Ambrosio when the sentry fired at Felix?

A. Alongside of the coal pile.

Q. How many shots did you hear fired at the place where you were?

A. Three.

Q. Did you see in what position Felix was in at the time the sentry shot him?

A. Felix was walking along the road, but when the sentry pointed his gun at him he was with his back toward the sentry.

Q. Explain the position Felix was in at the time the sentry fired at him?

A. When the first shot was fired at Felix, he ducked down, but when he was rising the second shot hit him in the shoulder.

Q. Show to the court the position Felix was in at the time of the second shot.

A. By reason of the first shot fired at him, he had ducked down and when he was about to rise he was hit by the second shot.

Q. How far was Felix from the wall of the storehouse when he was shot the second time?

A. Nearly against the wall of the storehouse?

Q. Coming from the dock and going towards the town, near which storehouse was Felix and on what side of the road?

32 A. The right-hand side.

Q. How do you know Felix was going to get some bamboo sticks?

A. Because he said so.

Q. What did Felix do after he had been fired at twice?

A. Fell to the ground.

Q. At what distance was he from the sentry when the sentry fired at him.

A. About 4 brazas.

Q. Do you know the sentry that fired at Felix Villanueva?

A. I did not know him because I was a certain distance away.

Q. How far were you from the place where this happened?

A. I believe about 80 brazas.

Q. Is that the distance from the coal pile to the storehouse?

A. Yes.

Q. What did you do after three shots had been fired?

A. First hid behind the coal pile. When we were on the beach the sentry pointed his rifle at us. I took off my hat and made some sign, and he said "All right, go ahead."

Q. Explain how you made this sign.

A. I just took off my hat and moved it back and forth and spread my arms out, and the sentry made the same movement and told me to go ahead.

Mr. MONTINOLA. That's all.

Cross-examination by Captain NETTLES:

Q. When did the soldier point his rifle at you?

A. After the three shots had been fired.

Q. The same soldier?

A. Yes.

Q. How soon after the three shots had been fired?

A. I do not know, because I was very scared.

Q. It was the same sentry who shot Felix that pointed his rifle at you?

A. Yes.

33 Q. And where were you at that time?

A. On the beach.

Q. On what side of the pier?

A. On the side of the coal pile on the other side where the water came up.

Q. Supposing this to be the road coming up from the dock and that table being the coal pile and the beach there, and also a beach on the other side of the road, I want to know which beach you were on? On the beach on the same side as the coal pile as you leave the dock and go toward the storehouses—then you were on the beach just below the coal pile?

A. Yes; we had gotten over the road and were walking already on the sand; the beach is lower than the wagon road.

Q. Did you go down on the beach as soon as these shots were fired?

A. Yes; I hurried on account of being scared.

Q. Who else was there when the sentry pointed his rifle at you?

A. My companion and myself.

Q. Did you see any other officers or soldiers about?

A. I saw the lieutenant when he went to the aid of Florentino, after having looked at Felix, who was already dead. The lieutenant went there without any shoes on and had on a kimona.

Q. Was the lieutenant there when the soldier pointed his rifle at you?

A. He was going to the aid of Florentino.

Q. Did the sentry come down to the beach when he pointed his rifle at you, or did he point it at you from the place where he had shot Felix?

A. He was walking along and coming towards us.

A. Was the lieutenant present when the sentry pointed his rifle at you?

A. No.

34 That's all.

RAFAEL YCASAMA, witness for the defense, after being duly sworn, testified as follows:

I am 58 years old; married; live in Buena Vista; my profession is a sanitary officer.

Q. For what town?

A. Buena Vista.

Q. Did you know Felix Villanueva?

A. Yes.

Q. When did you see him for the last time?

A. When he was dead.

Q. Do you know what Felix died of?

A. Santos and myself (Santos is the justice of the peace) went to visit the mother of Felix, Dominga.

Q. In what town is Santos justice of the peace?

A. Buena Vista.

Q. Where did you say you went?

A. To the house of Dominga Palacio.

Q. When?

A. I do not remember the date.

Q. What month?

A. I do not know.

Q. What is the relation between Dominga and Felix?

A. She is his mother-in-law.

Q. What did you see in the house of Dominga on the occasion you went there with the justice of the peace?

A. When the justice and I got there there was a good crowd of people there, who the justice of the peace ordered to get out, and then he ordered the shirt of Felix to be taken off and I noticed there was a wound on the left shoulder blade.

Q. Who was this that had the wound on the left shoulder?

A. Felix Villanueva.

Q. When did you go there, in the afternoon or morning?

A. In the afternoon.

35 Q. Do you remember the day of the week?

A. Sunday.

Q. What hour?

A. I do not know the hour; believe it was between 3 and 4.

Q. How far is the house of Dominga from the storehouse of the quartermaster's on the dock?

A. A little distance.

Q. How much, more or less?

A. I can not fix the distance in brazas.

That's all.

DOMINGA PALACIO, witness called for the Government, after being duly sworn, testified as follows:

Questions by Mr. Ross:

Q. Where do you live?
A. In Buena Vista.
Q. Did you know Felix Villanueva?
A. Yes; he was my son-in-law.
Q. When did you see him alive for the last time?
A. Sunday.
Q. What month?
A. July 24th, this year.
Q. What time did Felix leave your house on that Sunday, July 24th?
A. Early, because he was working for the quartermasters.
Q. What time did he return?
A. I can not tell, but it was about 11 o'clock when he returned for dinner.
Q. What did he do after dinner?
A. He returned home, but when he returned home he had some bamboo shoots with him.
Q. Where did Felix work?
A. In the storehouses.
Q. What happened to Felix on that day?
A. I do not know. When I awoke I heard some shots fired, but I did not know my son-in-law had been a victim.
Q. Did you see Felix after the shots?
36 A. People could not go away, but the lieutenant sent for me at 4 o'clock and ordered me to take the body away.
Q. Did you do it?
A. I went to the storehouse and had some people get hold of the body.
Q. Which storehouse?
A. The new one.
Q. Where was the body taken to?
A. To my house.
Q. Did you see the wounds?
A. No, because I was weeping; furthermore I am afraid of corpses.
Q. This storehouse where you went to get the corpse of Felix Villanueva, is it on the beach near the dock at Buena Vista?
A. Yes.
That's all.

WILLIS LYNCH, witness for the Government, after being duly sworn, testified as follows:

I am justice of the peace of Iloilo; married; live in Molo.

Questions by Mr. Ross:

Q. Are you familiar with the military post of Camp Jossman and

boat landing and Government storehouses on the water front in Guimaras?

A. Yes.

Q. Do you or not recollect of having been at that place on Sunday, July 24th of this year?

A. Yes, I was there.

Q. State whether or not while you were there your attention was attracted by any special occurrence or circumstance; and if so, state the particulars.

A. On July 24th I was at Camp Jossman, and returning to the boat landing, at about 3 o'clock, I noticed when opposite the warehouses, or just before I got to the warehouses, quite a number of soldiers leaving the warehouse. I was in a wagon and on get-
37 ting out I heard a groaning inside of the warehouse, and I went in there, and there was a man to the left, just inside, that was dead, and some 15 or 20 feet further in th room was the man groaning. There was a lieutenant there, and after looking around I spoke of the necessity of taking this man's dying statement, and told the lieutenant I was justice of the peace of the municipality of Iloilo, and in addition to that I had jurisdiction for preliminary examinations over the entire province. He said, "I will inform you this is a military reservation, and we will have to look after this," I said something further, and he then got a blank book and sent for an interpreter, and after a few minutes the interpreter came and they started to take the statement of the man, but previous to this he told him he was going to die, and the man swooned away, and it was 2 or 3 minutes before he came to. When he came to they asked him his name and another question or two, but the statement was not taken.

Q. Did you hear the conversation between this man and Lieut. Harrell?

A. Yes.

Q. Do you remember the name the man gave?

A. It seems like San Augustin; I am not positive.

Q. State whether or not you had any conversation with this apparently dying man.

A. Yes; I asked him as well as I could the cause of the trouble, if he had had any fight, and he said "No."

Capt. NETTLES. I ask the usual grounds be established that the man was warned that he was going to die.

Q. Was your conversation with him after he was informed by Lieut. Harrell that he was going to die?

A. Yes.

Q. How long after?

A. He could only talk a few words at a time.

Q. State whether or not all the conversation you had with him was after he had been told by Lieut. Harrell that he was going to die.

A. Yes, it was.

Q. What was that conversation?

A. I asked him if he had had any fight with the soldier, and he said he had not. I asked him if there were any bad words
38 between them, and he said "No." I asked him if he had any knife, and he said "No." I asked him where he was shot, and he put his hand to his back.

Q. Did you observe the nature of the wounds on either of these men?

A. I looked at them both.

Q. With what instrument had the wounds been made?

A. Gunshot. The first one, nearest the door, was shot in the right shoulder and the bullet came out under the right arm. The man nearest the door had bled very freely, and I noticed the blood tracks, or drops where he had been brought in, led around to the ontside of the wall, and nearto this was a large pool of blood. I noticed above that blood in the wall two bullet holes that had gone through and a little less than my hand apart. These holes were just above my kneecap, with my back against the wall. Not more than an inch or 1½ inches above my kneecap, and about the width of my hand between them.

Q. What was the position of the blood with reference to the bullet holes?

A. The blood was almost right under the bullet holes, possibly 6 inches away from it.

Q. Have you been to the place where the warehouse is situated since July 24th of this year.

A. I was there one day last week.

Q. Will ask you to state whether or not the ground along the side of that warehouse below those bullet holes is in the same condition now that it was in on July 24th?

A. It is now a little lower. It had just been built and was built up nearly even with the corrugated iron. Now it is much lower, the road having been beaten down, that is the rocks, and it is 3 or 4 inches lower.

Q. Anything else you observed there?

A. I looked at the bullet holes, and one of them came
39 through and struck the upright piece of sill and lodged in it; the other bullet struck the round of a chair, glanced, and went through a board under the side of the table and struck the railing that separates one part of the warehouse from the other part. I got down and looked through these holes and also the holes in the scales out through the bullet holes where they would lead to, and they led out to about 25 to 40 feet from where the pool of blood lay. They would lead to that point, judging from the angle and height a man would be.

Q. State whether you made any further examination of the ground around the blood spots, and what was the result.

A. Where this man lay against the wall there was blood run out into the street and then came around and led into the door where the

man lay. Other than that I could see no indication of blood marks. The man that was shot through the stomach did not bleed at all.

Q. Which one was shot through the stomach?

A. The one alive.

Q. Where was the one dead shot?

A. In the shoulder and the bullet came out on the right side. The wound on the right side bled freely.

Q. Wish you would describe the situation of the dock and buildings there at the landing at Guimaras, beginning at the dock as one lands from a boat, and walking up the road, describe the location of the coal pile, warehouses, and other buildings.

A. This table being the dock, it is built out into the water, and as you go up the dock you reach a large coal pile. The dock is built of stone and timber.

Q. How far from the dock is the coal pile?

A. From the landing point about 100 yards, and beyond the coal pile about 50 or 75 yards there are 2 warehouses—one on each side of the road. The street is about 70 feet wide.

Q. What is the distance from the coal pile to the distance where you observed two bullet holes in the wall?

A. Roughly estimated, 70 yards.

Q. About what time of the day did you arrive at the warehouse?

A. About 3 o'clock in the afternoon.

Q. Do you remember what day of the week?

A. Sunday.

Mr. Ross. That's all.

Cross-examination by Capt. NETTLES:

Q. Would like to ask you if you personally asked the questions and received the answers from this wounded native at the time you spoke of in the first part of your direct examination?

A. Yes.

Q. Would like to have you describe to the court the relative elevations between the beach, both sides of the road at the coal pile in comparison to the height of the road?

A. There has been but little change since. It was at that time freshly built and only level with coarse rocks. It was all rock.

Q. Is the road higher than the beach?

A. The road is not as high. That it built up a little higher than the road at this point. I think the road a little further down is a little higher than the beach. The slant is a little toward the beach.

Q. What I want is the relative differences in height in the road bed proper on which the coal pile is located and beach on either side of the road at that point?

A. I should think the road is a little higher, probably 6 inches. That's all.

Lieut. W. F. HARRELL, witness for the Government, after being duly sworn, testified as follows:

I am second lieut., 12th Infantry, stationed at Camp Jossman.

Questions by Mr. Ross:

41 Q. Where were you stationed on July 24th of this year?

A. At the beach Camp Jossman.

Q. Are you acquainted with the defendant here?

A. I know him.

Q. Who is he?

A. Private Grafton, Co. G, 12th Infantry.

Q. Do you remember having seen the defendant on July 24th of this year?

A. Yes.

Q. Please state the circumstances under which your attention was attracted to him on that day, if it was?

A. About 3 o'clock on the day mentioned, I heard two shots, and I left my quarters and went toward the storehouses. There I found the defendant and two natives that were shot.

Q. What was the defendant doing?

A. Sentry on post.

Q. Were there any other persons around there at that time?

A. I may have been preceded there by one or two soldiers—there were no others in the immediate vicinity.

Q. Describe the position in which you saw the two natives there?

A. One of them was lying in the center of the road, his feet pointing slightly to the northeast.

Q. Away from the beach?

A. Away from the beach, with his head towards the beach. The other, Felix Villanueva, was lying some distance back of him, 12 or 15 feet, against the wall, as he had fallen back with his head and shoulders against the wall of the storehouse.

Q. Were they both dead?

A. Neither of them were dead at this time.

Q. Did either of them die later on?

A. One in a few moments.

Q. Which one?

A. Felix Villanueva.

Q. Did the defendant at that time make any statement to

42 you as to who shot these two men?

A. He made a statement that gave me to understand he had shot them, I do not remember just how he said it.

Q. Was he armed at that time?

A. Yes.

Q. What kind of a weapon?

A. U. S. magazine rifle, caliber .30.

Q. Did you or not take any notice of his rifle at that time as to whether or not it had been fired?

A. I did not look at it myself, but asked him if it was loaded.

Q. What did he say?

A. Yes.

Q. Had you known these two men, Florintino Castro and Felix Villanueva, before July 24th?

A. I can not say that I knew them, I did not know them.

Cross-examination by Capt. NETTLES:

Q. Lieut. Harrell, did you make an investigation immediately after the occurrence, in the course of which the accused made any statement; if so, will ask you to relate fully the statement made by the accused.

Mr. Ross. Object to the question, as improper cross-examination. It is only proper for counsel to ask as to the conversation he had at the time, any other investigation is improper.

Capt. NETTLES. I think the question is proper, for the prosecution have brought out that Lieut. Harrell on hearing the shots proceeded to the spot. It seems almost unnecessary to say that he being the officer in charge would make an investigation.

The COURT. Think he may answer the question as to what was said by the accused at the time Lieut. Harrell came up and not go into conversations held afterwards.

A. The first thing I asked him was if his piece was loaded. He answered yes, and I told him to unload it. He stated he was
43 walking his post in a westerly direction from quarters towards the coal pile when he observed two natives coming in the direction from the beach, crossing the stone wall somewhere between the coal pile and the warehouses. He said he was about midway between my quarters and the east end of the storehouse when he first saw these natives. That he continued along his post until he got up within a few feet of the storehouse, and at this point the two natives had reached nearly to the western end of the storehouse. He said at this time he saw one of the natives take a large knife and put it in his shirt and twirl it in his hand for a moment, immediately putting it behind his arm. The action of the natives being suspicious he crossed to the other side of the road, opposite to the natives and continued along the north side of the road until he was nearly midway between the storehouses. At this point the natives were within a few feet from him in a northern direction and when some few feet away the one nearest him was in a crouching position as though he was about to change his knife to make a spring and at this instant he fired. He fired two shots without anything more to do, simply fired both shots. He also stated the natives had been acting suspicious.

Q. That is the substance of his conversation?

A. That is the substance of what he said.

Q. How many shots were fired?

A. Two.

Q. Are you positive on that point?

A. Yes, I am.

Q. What interval was there between the two shots?

A. Very little.

Q. How soon after the firing did you get to in sight of the sentry?

A. I was within sight of him within a few seconds. Simply had to go a distance from here to the corner of the room.

Q. Were you alert?

44 A. Yes; I moved in a run.

Q. When you came in sight of the sentry what was he doing?

A. He was standing very near the same place when I got there—that is, a few feet from these two natives, and was looking, as I remember, towards the beach. His head seemed to be in an inquiring sort of a way.

Q. What was the position of his piece?

A. In his hands.

Q. Who else was in sight at that time?

A. Capt. Davis, and a number of soldiers.

Q. How many natives were within your range of vision?

A. I remember seeing none.

Q. Did you see any natives near the coal pile?

A. No.

Q. Did you look towards the coal pile?

A. Towards the reservation I saw none.

Q. What is the distance from the coal pile to the point at which the sentry stood when the shots were fired?

A. About 100 yards.

Q. How many seconds elapsed after hearing the shots fired before you left your house and had the sentry within your sight?

A. I had him in view before I left my house. I had him in view as soon as I stepped on the porch from the time I left my room. It could not have been more than 12 to 15 seconds.

Q. From the time when you first saw him did he leave the particular spot in which he stood until you arrived—did he change his position?

A. He may have made a step or two one way or the other; practically the same place.

Q. Did you see him point his piece at any other natives after the firing of those shots?

A. No.

45 Q. Had he pointed his piece at any natives would you have seen him?

Mr. Ross. Object to the question, as it calls for an opinion of the witness.

The COURT. I understand the lieutenant has testified that the sentry was in his view all the time until he got there, and that practically answers the question, as he says he did not see him point the rifle at anyone.

Q. Please relate again the position of the two bodies in the road when you saw them. In answering the question will ask the lieutenant to look at this map.

(Witness takes map and shows to the court the location of the bodies as requested.)

Q. At the time you heard the two shots fired did you hear anything else?

A. I heard a cry of alarm.

Q. Who made that cry and what was it?

A. When I heard the cry I thought it was one of the sentries, and I judged it was this one. The cry, as I recall it, was: "Come here; somebody is trying to kill me."

Q. How soon after the shots did you hear that cry?

A. Almost at the same time.

Q. You stated you were in command at this point of the military reservation; please state the orders of sentry on post No. 1.

A. It extends from the hydrant to the coal pile, leading along the road during the day. At night from the coal pile to the storehouses, reaching around the storehouse and to the end of the dock every 30 minutes. The sentry will allow no Government property to be handled or interfered with or removed. He will require natives in passing through the reservation to stay strictly in
46 the road without loitering. Will not permit natives to go to the hydrant for water, except for Government purposes. In case the telephone rings three times and the storehouse is closed, report the fact. At night if boats come along the dock, report the fact to the corporal in time for two soldiers to meet this boat and tie it up. Orders in general.

Q. Did the orders provide for the halting of persons on that reservation in the daytime?

A. No.

Q. Appearing upon the scene and finding these dead bodies, what action did you take?

The COURT. I do not believe that is proper cross-examination. What do you mean, Captain Nettles?

Capt. NETTLES. I would like to bring out the action of the officer. He was in command there, and I think it is proper to show what he did.

The COURT. With reference to relieving the wounded men and taking care of them?

Capt. NETTLES. Both as to relieving them and the accused. He has testified in part, and I want to bring the whole thing out.

The COURT. The point is whether Homer E. Grafton, the soldier on trial, was justified in what he did before the lieutenant arrived there. There is no inference the lieut. did not do his duty; on the contrary the inference is he did do it.

Capt. NETTLES. There is a question of memory involved. There

may be a variation between the testimony of this officer and the two natives. I submit if this officer then and there made a careful examination and reported it in writing what was said and done at that time, it seems that fact being established would strengthen the testimony of the officer as to the matter of memory. It is for your honor to determine whether this officer is to be believed or those two natives who testified this morning.

47 The COURT. You may ask this officer if he made at the time or immediately after a note of the facts he has testified to here.

WITNESS. Yes; I did.

Q. When did you do that?

A. In the course of 45 minutes after the affair occurred. I took written testimony of anything I could find bearing on the case.

Q. What steps did you take, if any, to procure a dying declaration of the native still alive when you found him?

A. I questioned him myself, or attempted to. I told him he was going to die, and that I wanted him to tell me all he could. He was slow to answer, and did not seem disposed to talk. I had an interpreter, a member of the detachment, to come and make my statement clear to him so he might understand.

Q. What did he state, if anything?

Mr. Ross. This is getting out of cross-examination.

The COURT. What do you say, Capt. Nettles, as to whether this is a subject upon which you can touch. Would it not be better for you to put in your evidence and recall this witness if you wish to inquire of him in this line.

Capt. NETTLES. All right, your honor.

Redirect examination by Mr. Ross:

Q. What were the orders on July 24th with regard to the residents of that neighborhood passing up and down that road which runs from the dock between the warehouses—the road on which the shooting occurred?

A. In passing through the reservation sentries would require them to confine themselves to the road.

Q. Were they or not allowed to pass up and down the road freely under those conditions?

A. At my discretion and under surveillance.

48 Q. In the exercise of that discretion did you permit them, or not?

A. On that day they were permitted to pass.

Q. What are the orders in regard to sentries on post carrying his piece loaded in daytime?

A. There were no orders.

Q. Were there on July 24th?

A. No.

Q. What were the orders in regard to soldiers carrying bayonets?

A. There were none.

Q. Was that a part of the equipment of a soldier on guard, to have a bayonet attached to his belt?

A. Not necessarily.

Q. Did you permit your men to go on guard without their full equipment?

A. I determined the full equipment myself.

Q. What were your orders?

A. The uniform, campaign hat, gun, belt, and trousers.

Q. Do you remember if the men on guard did carry bayonets?

A. No; I do not believe they did. They did not carry them fixed.

Q. I am not speaking about being fixed, as to their being on their person; do you remember if that was done on July 24th or not?

A. They may or may have not.

Q. Do you remember whether Homer E. Grafton had a bayonet attached to his belt when you saw him?

A. I do not remember.

Q. How many rounds of ammunition was a sentry required to carry?

A. Ten.

Q. I believe you said his gun was loaded when you approached him?

A. Yes.

49 Q. Did he unload it in your presence?

A. Yes.

Q. He had the magazine loaded?

A. I think so; I am not sure.

Q. Do you remember how many cartridges he took out of his gun?

A. I do not know. The magazine may have been loaded and may not. My object was to unload the gun.

Q. What did he do when he unloaded the gun; merely unloaded the barrel, or magazine?

A. I do not remember.

Q. Did you count the cartridges in his belt?

A. No.

Q. What was the distance from the place where Grafton was when you arrived on the scene, and the quarters of the men stationed near the warehouse?

A. 75 or 80 yards; do not know exactly.

Q. Do you remember, approximately, the number of men in your attachment?

A. On July 24th, from 18 to 30.

Q. Do you recall the exact number on that day?

A. No.

Q. Approximately?

A. 24 to 30.

Q. How long after your arrival on the scene was it before Grafton was relieved from guard, if he was relieved.

A. He was relieved in probably ten or fifteen minutes.

Q. What was he doing in the meantime?

A. Standing about the storehouse, as I recollect.

Q. Was he talking to you all the time?

A. No; there was a good deal of excitement there. The guard turned out.

Q. Then you did not see him?

A. No; I was busy.

Q. You did not have your eyes on him during the ten or fifteen minutes?

A. No.

50 Q. Is it not a fact he was relieved by the men?

A. I directed that he be relieved.

Q. You said something about the position of the arms of this man lying against the wall. Please explain again the position of this man, as I did not understand plainly.

A. I stated that I remembered the man was lying as though he had fallen back against the wall and his head was against the wall.

Q. Do you remember the position of his right arm?

A. Do not.

Q. You say he had apparently fallen on his back?

A. Apparently so; neither sitting, standing, or lying down.

Mr. Ross. That's all.

WILLIS LYNCH recalled by the Government.

Questions by Mr. Ross:

Q. Will ask you to state whether or not you took notice as to the size of the two men you have described as lying in the warehouse, one dead and the other in a dying condition?

A. They were medium sized men. One of them a little under size and the one dead rather delicate.

Q. When you say medium sized, what standard do you use?

A. Medium size Filipino.

Q. What would you say the size of Felix Villanueva approximately would be?

A. The one that was dead was not far from the size of the third man there on that seat [indicating a medium-sized Filipino], probably not quite as heavily built. He had a very small neck.

Q. How was he dressed?

A. Had on a shirt, and I think colored pants, barefooted. His hat was not by him, but two hats were by the other man.

Q. What would you say to be the height of this man Felix Villanueva?

A. About 5 ft. and 4 inches.

51 Q. What about his weight?

A. About 120 lbs.

Q. Referring to the pool of blood under the bullet holes, how large was it?

A. Bigger than both hands; had settled down in a little hole between the rocks.
Q. Do you mean in diameter?
A. Across as big as both hands.
Mr. Ross. That's all.

D. M. FALVEY, witness for the Government, after being duly sworn, testified as follows:
I am a clerk, quartermaster's division, Guimaras.

Questions by Mr. Ross:

Q. How long have you been employed as quartermaster clerk at Guimaras?
A. Since a year ago last March.
Q. Will ask you whether or not it is your duty to keep the regular rolls of laborers employed at Guimaras?
A. Yes; it is.
Q. Did you ever know a Filipino by the name of Felix Villanueva?
A. Yes.
Q. How did you happen to know him?
A. He was employed by the quartermaster's at Buena Vista.
Q. When was he employed?
A. A year ago.
Q. How long was he in the service of the Government?
A. About one year.
Q. What were his duties?
A. He was a laborer.
Q. At what particular place?
A. Buena Vista.
Q. At what work?
A. Handling cargo.
Q. Will ask you if you mean the landing (when you say Buena Vista) opposite the Government storehouses at Guimaras?
52 A. Yes.
Q. Was he employed there in July this year?
A. Yes.
Q. At the time of his death?
A. Yes.
Mr. Ross. That's all.

Capt. NETTLES, cross-examination:
Q. Did you know the character of Felix Villanueva?
Mr. Ross. Object to the question as improper cross-examination.
Q. Do you know the character of Felix Villanueva as to fighting and combativeness?
The COURT. That comes in the same list as the former question and we had better not receive it just now, but it can come when it is proper.
Capt. NETTLES. That's all.

Mr. Ross. We have another witness and possibly two, but they are not here, and we will rest our case, with the privilege of calling the other witness when we can get him.

This is agreed to by Capt. Nettles, and the defense proceeds with their witnesses.

Lieutenant W. F. HARRELL, called by the defense as witness.

(Witness not sworn, as he was sworn as the Government's witness.)

Questions by Capt. NETTLES:

Q. In relation to the site of the Government reservation at Guimaras dock, have you made any plan or plat since the last meeting of the court?

A. Yes.

Q. Covering the distances and measurements of the buildings and the dock there?

A. Yes.

Q. Is this paper (marked "AA") a plat you have made of Guimaras landing?

A. Yes.

Capt. NETTLES. I now offer as evidence document marked "AA."

53 Mr. Ross. Object to this, for the reason it appears upon the face thereof a mark marked Florentino Castro, another mark Felix Villanueva, and another Private Grafton, and certain distances indicated, which would seem to make it the intention of the defense to attempt to show by this plat the situation of the deceased and also of Grafton, as testified about in this case. We submit that is no part of the map. The map should show the situation of the ground as it is and the buildings, about which we would make no question, but we submit the location of these bodies and of the defendant is oral testimony and cannot be shown by any map. If these are removed we have no objection to same being admitted.

Capt. NETTLES. We have no objection to them being removed. They are put there by Lieut. Harrell as he remembers it and are not binding on anyone except in relation to his testimony.

The COURT. Think the document may be admitted as illustrating the relative position of the ground, etc., but in relation to the defendant and the two bodies it is merely a claim and not evidence. With that view the plan may be received.

Q. Referring to the map, what is the distance from the coal pile to the west end of the warehouse?

A. 277 feet; that is, from the west end of the storehouse to the center of the coal pile as it is now.

Q. What distance apart are the two warehouses?

A. 42½ feet.

Q. What is the width of the roadway leading from the Guimaras dock between the two warehouses?

A. The same; it extends the full distance; probably six inches on each side that are eaves, making the road about 41½ feet wide.

Q. Please locate on the map which you have before you the relative situation of the sentry and the two wounded Filipinos, as you observed them upon arriving on the scene on July 24th last, and the distance betwen the sentry and the two bodies.

54 Mr. Ross. We object to that question; the location of these bodies can not possibly be shown by a map. It might be competent for the witness to point out to the court, but to go into the record as location of things that do not exist at present I submit is not competent. I am inclined to think it is competent to make a sketch of the plan of the witness and introduce it in connection with his testimony.

The COURT. It is merely an illustration of his memory. You can make it just as plain as you wish in cross-examination. I am inclined to believe this is competent.

Questions by the COURT:

Q. Have you marked on that plan a place where you say the sentry and the two bodies were when you arrived there?

A. Yes.

Q. How have you marked the position of the sentry?

A. By a dot with a small circle around it.

Q. And where Felix Villanueva lay?

A. That is marked the same way; near the southerly storehouse.

Q. And the other body, that of Florentino Castro?

A. That is marked the same way, near the center of the road.

Q. You had no mark upon the ground to go by in making this map as to those points?

A. Nothing that was left there by the persons at the time. These marks were first selected by me and the distances measured and put on this map.

Q. Does this map show the two storehouses?

A. Yes.

Q. Is there anything to mark where Villanueva lay near the storehouse?

A. There were two bullet holes.

Q. But the spot where the other two persons are—that is from your memory as you saw it when you arrived there, is it not?

A. Yes.

Questions by Capt. NETTLES:

Q. State the distance from the coal pile to the west end of the warehouse.

55 The COURT. He has stated that once before.

WITNESS. The distance as located here are as follows: Private Grafton from the northerly storehouse 10 feet, and to the southwest. The position of Florentino is 10½ feet from Private Grafton and 18 feet from the northerly storehouse. Felix Villanueva is 30 feet from Florentino Castro, and against the southerly storehouse.

Q. Going back to the occurrence of July 24th, please state pre-

cisely what you did on hearing the shots fired and the steps you proceeded to take.

Mr. Ross. Object to the question as immaterial and irrelevant.

The COURT. Form your questions instead of asking the witness to go over what he has already stated.

Q. What efforts, if any, were made to procure dying statements from the wounded Filipinos by yourself or anyone in your presence?

A. Soon after I reached the scene these men were put in the storehouse; probably 5 or 10 minutes afterwards, and an effort was made on my part through an interpreter to give them an opportunity to tell all they could about the occurrence. One of the natives was dead at this time, and the other in the center of the road, so the only one left to make a statement was mortally wounded, and I told him that he was going to die and would probably die in a short time. Then I tried to question him myself, but he did not understand, and then I had a soldier of the detachment ask him some questions. Asked him to tell just how it happened, but he just groaned. I then questioned him if he had any words with the sentry and he said, No, he did not say anything to the sentry. He was then asked what he was doing there, and he said he had been walking around the dock and was there without any particular reason. That is all that was gotten out of him in my presence.

56 Q. Did Mr. Lynch, the justice of the peace of Iloilo, take any statement from this Filipino in your presence at that time that you know of?

A. Mr. Lynch had a good deal to say about this time, and it was necessary for me to remind him that he must keep out of it; that I was making an investigation and that he would have to withdraw, though the dying statement was taken on his suggestion.

Q. May Judge Lynch have had a conversation with this wounded man that you are not aware of, in your presence?

Mr. Ross. Object to the question, as it is calling for an opinion of the witnes.

The COURT. I think it is competent to show by him if he was with the wounded man all the time.

Q. How was that, Lieutenant?

A. I was not there all the time. I went to my quarters to change my clothes or put on my uniform and then I made an inspection.

Q. Upon you' arrival at the scene of the shooting, state the manner and bearing of the accused.

Mr. Ross. Object to the question, calling for the opinion of the witness.

The COURT. I think it is competent for him to state if the man did the shooting was calm, cool or excited.

A. I considered him calm for the circumstances, although he was probably a little excited, enough to be a little nervous.

Q. Did you observe any signs of levity on the part of the accused?

A. No; none whatever.

Q. Did you observe any appearances of intoxication or appearance of his being under the influence of liquor?

A. None whatever.

Q. What is the character of the accused for self-control, coolnes and soldierly conduct?

Mr. Ross. Object to the question as irrelevant and immaterial.

57 The COURT. It is supposed to be first class until it has been attacked. I think this will have to be excluded until the Government attacks. It is competent for the defendant to put his character in issue, but not in this way.

After a lengthy discussion by both sides, the court makes the following ruling: I confess for a moment I was mixed. The question of character may be put in issue in the beginning by the defendant; that is, he may give evidence to show he is a man of good character before it has been attacked. Now, I think if his character is in issue at all here, that it is in issue with respect to all of its qualities, of all that might have led him to do this act, and I am inclined to believe his character for steadiness and excitableness, and his character for soldierly qualities would embrace all those things, and the defendant, if he desires, may put in evidence with reference to those points. It is much better to go into a full explanation of this case than to exclude anything that might belong in the case.

(Last question repeated.)

A. Both within my knowledge and his reputation it is "excellent."

Q. What would you say as to the size of the two Filipinos you observed on that day, as compared with the average Filipino?

A. In height Felix Villanueva was probably taller by an inch or 2 than the average Filipino. Florentino was probably the average size, but a good deal more muscular and heavier than the average Filipino.

Q. Can you state about the weight of Felix Villanueva?

A. Probably 130 pounds.

Q. What was the reputation of Felix as to combativeness, if you know it?

Mr. Ross. Object to the question as incompetent.

The COURT. I think this question will have to be excluded.

Q. Do you know the course of the bullets fired by the accused on that occasion? If so, please explain as to whether they entered the wall, or any observations you made.

58. A. The bullets passed through the corrugated iron about 24 inches from the ground. The center of the two holes is about 1½ inches apart. After coming through the wall they seem to diverge, one going in the back of the scales and the other into the back of a chair. The distance between the two points named was about 10 to 14 inches, I judge. That is, they had diverged at a distance of 1½ feet from the wall about one foot. After that there was evidence of one having ricochet'd to the right and took effect in the small gate leading into the storehouse.

Q. At what height above the ground upon that corrugated iron wall was the point of entrance of those two bullets?

A. I have not measured it, but I judge nearly 2 feet—20 inches or 2 feet.

Q. What is the distance from the point of entrance in the corrugated iron wall to the point where you have indicated where the sentry stood when you found him upon arriving upon the scene?

A. About 45 feet.

Q. You have stated that within 10 or 15 seconds after the firing of the shots you arrived on the scene; did either of the natives move of his own motion from the place where they were lying when you first saw them?

A. No; contraction of the muscles, groans, but no change of position.

Q. Did you observe any unusual movements or acts on the part of the natives about the Buena Vista landing on July 24th?

Mr. Ross. Object to the question as improper and irrelevant.

The COURT. I think that question as presented will have to be excluded.

Q. You stated in your previous testimony that you made an inspection of the Buena Vista landing after the shooting; why did you do so?

59 Mr. Ross. Object to the question; same ground as before.

An inspection the witness made after the affair, I think, is not competent.

The COURT. This man is accused of assassination. The defense, as it has been outlined, is that he did this act in self-defense; that he had reason to believe and did believe these natives were approaching him with the purpose of assaulting him and with dangerous weapons. Now, we have got to take matters as they stood at the time of the act. What subsequently developed could not have influenced his conduct at the time he did the act, and knowledge possessed by another individual and not by him could not have influenced him. Objection is sustained.

Q. Do you recognize this knife [showing witness Exhibit A]?

A. Yes; it is apparently the same knife that was picked up in the road at the time of this shooting, July 24th.

Q. Is it in the same condition now as it was then?

A. No; it was not as rusty then as now, and I do not believe it was as shaky.

Q. Do you know Ambrosio Orbidilla and Macario Orbe?

A. I believe there were two such men employed in the quartermaster's department, but I hardly knew them.

Q. What steps did you take and what efforts did you make to get any information that could be gotten from the quartermaster's employees under you at the Guimaras landing?

Mr. Ross. Object to the question, as it is immaterial.

The COURT. You may ask him what he did.

A. I had all the employees lined up in the storehouse one afternoon, at request of Capt. Hutton, and through the foreman of the employees they were explained the circumstances and the reasons why we wanted this information, and each was asked individually again and again if he knew anything at all about the facts in connec-
60 tion with the shooting on July 24th. None admitted knowing anything about it, and they answered to the negative.

Q. Were these two witnesses in that line?

A. One of them was; I do not know what name he answered to.

Q. And the other one you think was not?

A. I do not know; he might have been and he might have not.

Q. Ambrosio you mean?

A. It was the larger one of the 2.

Cross-examination by Mr. Ross:

Q. Were you present when they were lined up at the warehouse?

A. Yes.

Q. Who asked the questions?

A. Asked through an interpreter by Capt. Hutton.

Q. Who was the interpreter?

A. Felix Santos, foreman.

Q. Where was the inquiry held?

A. In the north storehouse.

Q. When?

A. 10 or 12 days after the occurrence.

Q. Were all the employees of the quartermasters present?

A. They were supposed to be; there might have been one or two absent.

Q. Yes; but were they?

A. I could not say every one was.

Q. You particularly noticed one of the witnesses who testified in this case?

A. I could almost swear I noticed both.

Q. Will you tell us how you are so positive; what fixed that in your mind at the time?

A. I might add a good memory.

Q. How many natives were present?

A. Maybe 30; maybe 20.

Q. What were the names of some of the others present?

A. Biscao—I do not know their names, but their faces.

61 Q. You noticed particularly these two witnesses were there?

A. I have answered that.

Q. You noticed particularly, did you, that both of these men were there?

A. I said before I could almost swear to it.

Q. I asked you if you noted particularly these two men on that occasion, not what you could swear to, but what you noticed on that occasion.

A. I noticed one.

Q. Which one?

A. The largest.

Q. What particular thing attracted your attention to him?

A. The man had at the time a large sore on the bottom of his foot, and the state of his health was a matter of consideration by me, and I thought several times of having him receive medical attention.

Q. That is what attracted your attention?

A. That man is better known to me.

Q. That is what caused you to notice him on that occasion?

A. Indirectly; yes.

Q. Now, Lieut. Harrell, you have testified that you knew certain things from hearsay and of your own knowledge as to the character of the defendant. I want you to tell us what you know of your own knowledge about the defendant.

A. I know he was a member of my detachment in July, and that his conduct was most excellent during that time.

Q. How do you know that?

A. From what I saw.

Q. What did you see that caused you to believe that his character was excellent?

A. As a soldier.

62 Q. In what respect, please explain to us?

A. The manner and method in which he related his story to me and in my presence on one or two occasions, and the way he has borne himself ever since.

Q. Did you know Grafton well before that time?

A. No.

Q. Your opinion is formed by things that have happened since that date?

A. On that date.

Q. What did you notice particularly on that date that caused you to believe his character was excellent?

A. His bearing; the way he related events, and the way he acted through the whole affair.

Q. Please tell us what you mean by his bearing.

A. His manner of conduct, the way he looked, talked, and the amount of excitement he showed and did not show. The amount of feeling, and all of those things.

Q. He was particularly cool, was he?

A. I did not say he was; he was not.

Q. On his conduct on that day and bearing is what you base your statement on that he is a man of excellent character?

A. That and other things.

Q. What other things?

A. The way he has conducted himself at this trial and other trials; the way he conducted himself at the post. All those things made me believe the man is an excellent soldier.

Q. Referring to the condition of the ground over there, is it not

a fact that on July 24th the ground alongside of the warehouses below those buliet holes was somewhat higher than it is now; that is, the rocks and earth were loose—that made it some higher?

63 A. It is a fact that the ground had been filled in and has since been beaten down by wagons. There may *be* a difference of 1 or 1½ inches between them.

Q. You testify it was not more than one and one-half inches on July 24th?

A. Yes; in my judgment.

Q. Lieut. Harrel, on what do you base the statement that you have made on the map in evidence as to the difference between the two bodies of the two found there and the distance between them and the sentinel; from what did you prepare that matter?

A. The position of these men was selected on the ground from memory by me and then the distances were measured with a tape line.

Q. Naturally from memory?

A. Except the case of Felix Villanueva.

Q. When you came down there on July the 24th did you take particular notice of the locality of the body of Florentino in the middle of the road so you could be positive now as to where it was located?

A. I located the body; it may have been a foot or two, but I do not think it could vary very much.

Q. I say when you first came down you particularly noticed all these things and fixed them in your mind, did you?

A. Right to the contrary, I did not try to fix anything in my mind.

Q. You took particular notice with reference to the position of the buildings, bodies, and the sentinel?

A. I can not say that I took particular notice.

Q. Then it might vary considerably?

64 A. It might vary some little. I did not put any spot down on the ground; that is just as I remember it.

Q. Then you do not pretend to be correct?

A. No; not at all.

Q. You do not know whether Grafton moved after he fired the shot or not?

A. I do not know what he did after he fired the shots and between the time I saw him.

Q. What were you doing?

A. Sitting down talking.

Q. With whom?

A. Captain Davis.

Q. So you can not testify as to whether Grafton moved and changed his position from the time you heard the shots?

A. I can not testify as to what he did from the time he fired the shots until I saw him.

Q. You had him in your eye all the time did you?

A. There might have been a half a second that I didn't.

Q. And he never moved from the first time you saw him until you arrived.

A. He may have moved a yard either way.

Q. How long was it before you relieved him.

A. Ten or fifteen minutes.

Q. You did not have him in your sight all that time?

A. No.

Q. Who acted as interpreter when you made efforts to get the dying statement of Florentino?

A. A soldier, Private Orenbeck.

Q. What language was he examined in?

A. I do not know. I spoke to the soldier in English and
65 he translated it to him in his own way.

Q. Do you understand Spanish?

A. Very little.

Q. Visaya?

A. None.

Q. Then your statement as to facts and so forth is based upon what the soldier said?

A. Yes.

Q. Did not Mr. Lynch ask any questions when you were there?

A. He may have attempted to do so; he was generally around.

Q. Did he ask any questions and receive any answers while you were present?

A. He may have asked a question or so.

Q. You would not say more than one?

A. Probably not.

Q. Would you say whether he did or not, or could you say?

A. I could say he conducted no investigation within my knowledge.

Q. The question is, Did he ask any questions in your presence or not?

A. I could not say.

Q. Is it not a fact that you told Mr. Lynch that he was on a military reservation, and must be careful what he did there, and that there was a guardhouse on the reservation?

A. I did not put it that way. I told him that I would have to inform him that that was a military reservation and he would have to leave these things to me, and if he did not, I would put him off the reservation or in the guardhouse.

Q. And you threatened to put him in the guardhouse.

A. No; I told him I would do it.

Q. And he told you he was justice of the peace of Iloilo?

A. I believe he did.

Q. Lieutenant Harrel, you testified upon the bearing and manner of the defendant; wish you would tell us what examination
66 you made of his equipment, his rifle, and ammunition when you arrived on the scene.

A. I made no examination of his rifle or equipment.
Q. Did you not have hold of his gun?
A. Yes; but I did not examine it.
Q. Did you not make an examination and find out how many cartridges he had fired?
A. No.
Q. Did not ask him?
A. No.
Q. And did not immediately place him under arrest?
A. No; not immediately.
Q. Is it not a fact that for about a half hour that this defendant was entirely unattended to by you; that you allowed him to remain there; you going about from place to place, paying no attention to him?
A. I do not think it was over fifteen minutes before he was relieved; I do not know, but there was more or less excitement—it might have been ten minutes.
Q. There was considerable excitement there at the time, was there not?
A. That all depends on how you look at it. I do not think there was an overamount of excitement—some.
Q. So much so that you do not remember distinctly what occurred during those fifteen minutes, except that you changed your clothes and went here and there; is that what you said?
A. No.
Q. What did you say?
A. I said I did not remember the exact minutes.
Q. You remember now as to the exact distance between the bodies?
A. I have not said so.
Q. More or less, may be?
A. Yes; from memory.
Q. Then may be is just as accurate as your memory about
67 those other things?
A. Probably so.
Q. Were you particularly calm and cool then?
A. I was not particularly cool.
Q. Were you not considerably agitated and excited?
A. Not in my way of thinking.
Q. How were you dressed at the time you went out of your house?
A. Undershirt, drawers, socks, and a "kimona."
Q. Is is not a fact that very soon after this occurrence in Guimaras, July the 24th, you stated something to this effect: "I'm going to save this man; to see that he not punished for this thing, if I can help it."
A. When am I supposed to have stated this?
Q. Very soon after the occurrence at Guimaras.
Captain NETTLES. I would request that the question be made more definite; to whom he made this statement, and when.

The COURT. He may answer the question.

A. I do not know I ever said anything about saving him; I may have said that he had my sympathy.

Q. Did you at any time say anything to the effect that you were going to do everything you could to save this man, on account of the act he committed that day?

A. No; I never said anything like that.

The COURT. Did you say that you were going to try and save him from punishment for what he did that day, in substance?

A. I may have said that. I recall no particular date of saying it.

Q. As you remember, what was the distance between the body of Felix, the man lying next to the wall, and the body of Castro,
68 lying in the road?

A. Locating the two bodies as I remember the distance I find it about thirty feet.

Q. When you went down there that day did Grafton tell you at what distance he was from Villanueva when he fired at him?

A. He did not express it in the form of feet or yards.

Q. How did he express it?

A. He said about how far Florentino was away from him and said the other was following some distance.

Q. Where you when you heard the last shot fired?

A. Still in my room.

Q. Did you say you saw Grafton from your window before you went out into the road?

A. I did not.

Q. Do you know a man by the name of Muller?

A. Yes.

Q. Sanitary inspector?

A. I do not know; I know Martin Muller.

Q. Do you remember having a conversation with him about this case?

A. Two or three times.

Q. Do you remember one that occurred the day after the shooting?

A. I do not remember.

Q. When was the first conversation you had with him about the shooting?

A. Short while after the shooting, the same day.

Q. Do you remember saying to him in that conversation that Grafton ought to be cleared and you were going to see that he was cleared, in substance?

A. I can not predict what will occur. I may have said he would have my support financially or otherwise.

Q. It is a fact that you said to Mr. Muller that this man
69 ought to be cleared and that you would see that he was cleared?

A. I am positive I did not say that.

Q. What did you say?

A. I may have said that the man ought to be cleared.

Q. Do you remember whether you did say that or not?

A. I do not recall saying it.

Q. Do you not recall anything of that kind?

A. No; my conversation was not along that line.

Q. Did you use those words or say anything to that effect in any subsequent conversation to Mr. Muller, and that you believed that the man ought to be cleared and that you were going to see that he was cleared.

A. Can not say that I did.

Q. To this effect: That it did not make any difference what he had done there, you had made up your mind and were going to see that he was cleared.

A. Positively nothing of that kind.

Q. What was it?

A. I may have said that I, as this man's commanding officer, would give him my support; that I had a conviction that he had acted within reasonable bounds.

Q. You do not remember of saying that?

A. I have no recollection of making such a statement to Mr. Muller.

Q. How long had Grafton been down at the landing as a member of that detachment?

A. I think three days.

Q. The detachment was changed frequently—that is, a man would be brought down and would go back when he had been there about three days?

A. Yes.

Mr. Ross. That's all.

Captain G. H. Davis, after being duly sworn, testified as follows:

70 I am captain of the Twelfth Infantry, stationed at Guimaras.

Questions by Lieut. SHIELDS:

Q. State where you were on July the 24th, 1904.

A. I went from Iloilo to Camp Jossman, passing through Buena Vista, landing at about three o'clock in the afternoon.

Q. While at Buena Vista landing did anything unusual occur?

A. Shortly after arriving at Buena Vista landing, and while I was in the quarters of Lieut. Harrell, two shots were fired in rapid succession. I went to the door of Lieut. Harrel's quarters and saw the sentinel standing between the warehouse of the quartermaster's and that place. A man was lying in the center of the road. I went back and got my hat, and then we went to the place where this man was lying. At the same time Lieut. Harrel and two or three enlisted of the detachment stationed there ran down to the warehouse. As we approached the scene, or I should say either just before or just after the shooting—I have forgotten which—the sentinel called, as nearly as I can remember, "Come on down; they are trying to knife me."

As we approached the scene, and approaching the man lying in the middle of the road, the sentinel said——

Mr. Ross. Object to anything that the accused said afterwards.

Captain NETTLES. That is a part of the res gestae and is admissible.

Mr. Ross. The remarks that the accused made in his own favor, no matter how close to the act, or not admissible, they are incompetent.

The COURT. I understand the res gestae constitutes state-
71 ments made in the act itself, qualifying it. After the act is finished a declaration made by the party can not be considered res gestae. It must be made simultaneously with the act. It is sometimes difficult to distinguish what is a part of the res gestae, but in this instance the captain at the time of the firing was in the house and run a distance of forty or fifty yards, and after his arrival this explanation was made. Now, I think that is not res gestae.

Captain NETTLES. Our purpose is to show by this witness that the accused said at the time that he was attacked by these two natives and he shot them in defense of his life on post. I think this comes within the definition of res gestae, and I think the accused after the shooting said this, and it did qualify it at the time of the shooting.

The COURT. It may be excluded, and you can have the benefit of an exception.

Captain NETTLES. Exception.

Q. How much time elapsed between the firing of the two shots and the time you were in sight of the sentinel?

A. A few seconds.

Q. Can you be more definite than that?

A. Not more than ten seconds.

Q. How much time elapsed between the firing of the shots and the time you arrived on the scene of the shooting?

A. Not more than half a minute.

Q. Were you the first on the scene of action?

A. I do not know; three or four others arrived about the same time.

Q. Will you state to the court what you saw when you arrived there?

A. I saw the sentinel standing on the north side of the
72 road towards the northern storehouse and a Filipino lying in the center of the road between the storehouses, and another Filipino lying against the southernly storehouse, near the point where the bullet marks are.

Q. Where in relation to the point where the bullet marks are was the man you stated that was lying in the middle of the road?

A. The wounded man in the middle of the road was about 15 or 20 feet from those holes, in the middle of the road, slightly to the east of a line drawn north and south through those holes.

Q. Which direction is east?

A. Towards Camp Jossman.

Q. Does that road run east and west practically?

A. Very nearly, I think.

Q. Where was the sentinel standing when you first saw him in reference to the position of these two natives?

A. He was standing closer to the north storehouse and almost in a line with the second man.

Q. How was the native in the middle of the road lying?

A. On his back.

Q. In what direction were his feet?

A. Towards Camp Jossman.

Q. Were his feet towards the sentinel?

A. Yes.

Q. From the time you first saw this native until the time he was removed did he move from the location you first saw him?

A. He made one or two attempts to arise, but he could not move his feet or legs.

Q. How far were these two natives to the east of the two westerly doors in the two warehouses?

A. About 20 or 25 feet.

73 Q. Taking a line at right angles at the point where those two bullet holes are from the storehouse, what side would it be on?

A. On the east side of that line.

Q. You say you heard two shots. Can you state positively of your own knowledge whether there were more or less than two shots?

A. I heard two shots. I think I would have heard them had there been any others.

Q. How far were you from the place where the shooting occurred at the time of the shooting?

A. About 50 yards.

Q. What were you doing at the time the shots were fired?

A. Sitting in Lieut. Harrell's quarters talking to him.

Q. Were the sounds of the shots clear and distinct?

A. Clear and distinct.

Q. Did you see any weapon in possession of anyone other than the sentinel there at the post?

A. I saw a knife lying near the man who was in the middle of the road.

Q. Where was the knife in relation to the location of the man?

A. Quite near him and near to his right foot.

Q. Can you state whether or not this is the knife [showing him Exhibit A]?

A. The knife looked like this. I think this is the one.

Q. Was the knife in the same condition then as it is now?

A. It has become rusty, otherwise the same, and it has a mark on it it did not have then.

Q. After the shots and up to the time you arrived on the scene of the shooting did you see any natives near or about that locality?

A. No, except the two wounded men.

74 Q. In going from Lieut. Harroll's house to the scene of the shooting were you or not able to look down the road towards the pier?

A. I was able to look down that way.

Q. Did you or not look down that way?

A. I do not remember whether I looked down that way; a few seconds after I arrived I looked that way.

Q. Were there any natives near or in sight?

A. I did not see any.

Q. Do you know where the bullets of the two shots went, if so state where?

A. The marks on the storehouses showed that two bullets had gone through the wall of the storehouse about 2 inches apart. One of them struck the platform scales. I do not remember where it went after that. The other struck a chair near the scales and from there went into a rail that was used to partition off the space used for the office. I did not follow it any further.

Q. After you arrived at the scene of the shooting, how long did you remain there?

A. A very short time, not more than five minutes.

Q. Did you see the accused during the time you were there?

A. Yes.

Q. Where was he?

A. Standing in the road between the two warehouses, as I approached; afterwards he came near to the doors of the warehouses, and a number of other men were formed in a line by Lieut Harrell.

Q. Going back to the course of the two bullets, taking that same line which the judge indicated perpendicular to the wall of the south storehouse, what was the course of the bullet to the east or west of that line after it entered the warehouse?

A. To the west of that line.

75 Q. In other words, from what direction at the point of entrance in the warehouse were the shots fired?

A. They were fired from the northeast of this point of entrance.

Q. What was the manner of the accused when you arrived at the scene of the shooting?

A. He was apparently very alert, was slightly excited, but at the same time conducted himself in a manner that showed he was clear-headed and ready for the performance of his duty.

Cross-examination by Mr. Ross:

Q. There was no indication of his having been drunk?

A. None whatever.

Q. You would say from his manner that he was in a condition of mind to know what he was doing and acted with deliberation and intelligence?

A. Yes.

Q. When you went to the shooting did you go in company with Lieut. Harrell, before or after?

A. About the same time; could not say whether before or after.

Q. When you heard the shots, I understand you to say, you went out to the door and looked and then returned and got your hat?

A. Yes.

Q. When you heard the exclamation of the accused, "Come here they are trying to knife me," was that before or after the shots were fired?

A. I do not remember.

Q. When did you first see Grafton?

A. When I went to the door after the shots were fired.

Q. Then you went back and got your hat?

A. Yes.

Q. And when you came back was he in the same place?

A. Yes.

76 Q. When you arrived at the scene?

A. He remained standing in the same place until we arrived, as I remember.

Q. As you recollect, he did not change his position any time after the shots were fired until you arrived there?

A. No.

Q. What would you say the distance was between Grafton when you saw him and the body of the man lying against the wall of the warehouse?

A. About thirty feet.

Q. What would you say the distance was between Grafton and the body of the man lying in the middle of the road?

A. Ten or fifteen feet.

Mr. Ross. That's all.

Captain F. S. HUTTON, witness for the defense, after being duly sworn, testified as follows:

Questions by Lieut. SHIELDS:

I am captain, 12th Infantry, stationed at Guimeras.

Q. Have you in your official capacity had anything to do with the killing of the two natives by Homer E. Grafton, Co. G, 12th Infantry?

A. I have acted as judge-advocate of the general court-martial for the trial of the soldier for this offense.

Q. In the performance of your duty as judge-advocate of that court did you or not make any investigation of the alleged offense?

A. I did.

Q. Did you make an investigation of it at Buena Vista?

A. Both at Buena Vista and the Buena Vista Landing.

Q. What investigation did you make at the Buena Vista Landing?

Mr. Ross. Object to the question as irrelevant and immaterial.

The COURT. Could you not come to the point by asking the witness if he was present at the time the quartermaster's employes were lined up?

77 A. I was present; I caused them to be lined up.

Q. Tell when that was and what occurred at the time.

A. I can not give the exact date of this, but some time, probably

ten days or two weeks, after the shooting. I caused all the quartermaster employees to be gathered together in one of the storehouses and lined up so that I could talk to them. The day was very rainy and they were all there and not at work, it being easy to collect them. I had to use an interpreter for most of my talking, although I understand how to talk Spanish. The object of lining them up was to see if any of them knew anything about the shooting of these two natives; if they were present or near by, where they were, and if they knew anyone that knew anything about it. I could get very little information from them.

Q. Tell what was done there.

A. They were asked what I have already stated; that is, if they knew anything about this shooting or knew anyone that knew anything about it.

Q. Were the men lined up?

A. Yes; I was in front of them with Lieut. Harrell, and I believe Mr. Falvey was present.

Q. Who did you talk to?

A. I understand Spanish, and talked to those that understood Spanish, and those who did not understand Spanish I had it interpreted to them in Visaya.

Q. And you got no information?

A. Yes; the fact that these natives had a knife in their possession. Whether or not the two native witnesses in this case were present I do not know, but no one made any statement to me there that he was present and saw the commission of this offense, and the question as to whether or not they had been there or saw it was repeated to them two or three times.

78 Cross-examination by Mr. Ross:

Q. Did you talk personally with each one of these men, or generally to all?

A. I talked personally with some of them where they showed a disposition to talk or give any evidence, and the question as to whether or not they knew anything was addressed to all of them.

Q. About how many men were there?

A. Somewhere between 30 and fifty.

Q. Do you remember if you talked personally with these two men?

A. I did not know the two men; one I have seen and the other I do not know.

Q. You testified that you were judge-advocate in this military court that tried Grafton?

A. Yes.

Q. Did you have any conversation with him about this before the trial?

A. Yes.

Q. Is it not a fact that he told you there were two native companions of the two natives killed?

A. No; he made no statement as to that fact.

Q. When did you talk with the presidente?

A. Some time between the commission of the shooting and before the trial—whether it was a week or two days before I do not know. I should say about the 5th or 10 of August.

Redirect examination by Capt. NETTLES:

Q. For what purpose did you have an interview with the presidente of Buena Vista?

A. For the purpose of learning of any information regarding the shooting of these natives or of any witnesses of the shooting.

Capt. NETTLE. That's all.

79 SANTOS ESPINOSA, witness for the defense, after being duly sworn, testified as follows:

I am 22 years old, single, employee of the quartermaster's at Buena Vista.

Questions by Lieut. SHIELDS:

Q. How long have you been employed by the quartermasters at at Guimeras?

A. More than two years.

Q. Do you know Ambrosio Obadilla?

A. Yes.

Q. Do you know Macario Orbe?

A. Yes.

Q. Do you know what their occupation was during the month of July of this year?

A. Yes.

Q. What?

A. Boatsmen.

Q. In whose employ?

A. Quartermasters at Buena Vista.

Q. Do you know Capt. Hutton, of the 12th Infantry?

A. Yes.

Q. Were you present or not in one of the camarines when Capt. Hutton made an examination, or asked questions of the quartermaster employees?

A. Yes.

Q. Did he have an interpreter?

A. Yes.

Q. Who was it?

A. He had me for his interpreter.

Q. Can you state whether or not Macario Orbe and Ambrosio Obadilla were present at that time?

A. Yes; they were there.

Q. Did you, at the direction of Capt. Hutton, have any conversation with these two men in regard to the shooting of
80 the two natives of Buena Vista by the soldier of the 12th Infantry, named Grafton?

A. Yes.

Q. What was that conversation?

The COURT. You had better take them separately

Q. What conversation did you have with Ambrosio?

A. I was instructed by Capt. Hutton and lieutenant to tell these men to tell the truth if they knew anything about this matter, and I asked Ambrosio if he knew anything, and he said he did not.

Q. What conversation did you have with Macario?

A. I asked him if he saw the shooting of these two men, and he said that he knew nothing about it.

Q. Did Ambrosio ever at any time say to you that he saw the shooting of the two natives by the soldier?

A. He told me then that he did not see the shooting and he did not talk to me after that.

Q. Have you ever had any conversation with Macario about the shooting since that day in the camarine?

A. No.

Cross-examination by Mr. MONTINOLA:

Q. Where were you when this shooting occurred on July 24th of this year?

A. In the morning I was on the dock.

Q. And in the afternoon where were you?

A. At 2 o'clock in the afternoon I went to my home for dinner.

Q. When did you leave your house again?

A. At 2.30 p. m.

Q. Where did you go?

A. Went home to have dinner at 2.30 and heard two shots fired at about 3 p. m.

Q. How many persons were in the camarine when Capt. Hutton made the investigation?

A. I do not know; I did not count them—16 or 18.

81 Q. Is it not true that you were not present at the examination at all, but you came in afterwards and ordered the men to go out to work?

A. I got them together and asked them the questions.

Q. What persons made statements on that occasion?

A. Alfonso Remos, Alejandro, Toribio, Felix Daza; I don't remember the others now, because changes were weekly in the quartermaster's department.

Q. But those persons you have named you remembered were the only ones that made any statement on that occasion.

A. Others made statements, but I do not remember their names.

Q. Do you understand English?

A. Oh, a little.

Q. Those persons you have referred to speak English?

A. No; but I talked Visayan to them.

Q. But do you understand English very well?

A. No; but the questions were put to me in Spanish.

Q. Who put the questions to you in Spanish?

A. Captain Hutton.

Q. Is it not true that you did not ask each one of those laborers there if they knew anything about this case, but just put the question to all of them.

A. I lined them up and told them to tell truthfully what they knew about this case; the question was put to each of them, but it was the same question.

Q. How many Filipino employees were lined up there?

A. I was not able to count them.

Q. Is it not true that when you put this question in general to them the only one that answered was Felix Daza?

A. All of them answered that they knew nothing about it.

Q. In what way were these answers given from all of them?

A. I told all of them to tell if they knew anything about the shooting, and they answered, "I do not know."

Q. What did Felix do?

82 The COURT. It does not matter. The only point is to find out if these two men said that.

That's all.

F. D. WICHAM. Witness called for the defendant, after being duly sworn, testified as follows:

I am captain, 12th Infantry, U. S. Army.

Questions by Lieut. SHIELDS:

Q. Where and on what duty have you been on since your arrival in the Philippine Islands?

A. I have been on duty at Camp Jossman, in command of Co. G of the 12th Infantry.

Q. State the date of your arrival?

A. April 3rd, 1904.

Q. Do you know Homer E. Grafton?

A. I do; private Co. G, 12th Infantry.

Q. How long have you known him?

A. Since some time last year, when he joined the company at Salt Lake City, on our way to the Philippines.

Q. Was he under your personal observation from that time until July 24th, 1904?

A. He was always a private in my company.

Q. What can you state as to his character?

A. So far as I know him his character has been excellent. I considered his character better than the average man. He had been attending the school for noncommissioned officers, and I had intended to make him a corporal.

Q. What can you say to his character as to sobriety and steadiness?

A. So far as I know I have never heard or seen Private Grafton under the influence of intoxicants since he has been in my company. He is a soldier I would put absolute confidence in in the field and out of the field.

Q. Please state whether or not this opinion of Private Grafton was formed before or after July 24th, 1904?

83 A. It was formed before July 24th, on account of characteristics shown by him.

Q. Since you have been in command of Company G of the 12th Infantry has he ever been on trial for anything?

A. No.

That's all.

Sargeant E. PROPST, witness for the defendant, after being duly sworn, testified as follows.

Questions by Lieut. SHIELDS:

Q. Where and on what duty were you on July 24th, 1904?

A. I was senior noncommissioned officer in charge of Buena Vista.

Q. Do you know the accused, Homer E. Grafton?

A. I do.

Q. Was he a member of your detachment at that time?

A. Yes.

Q. On what duty was he that day?

A. On guard.

Q. Can you state what relief and what hours?

A. He was on first relief, from 8 to 10, then from 2 to 4.

Q. Did anything unusual occur on July 24th?

A. The shooting of the two natives.

Q. State what you know concerning the shooting of these two natives?

A. I know very little; I know nothing.

Q. What called your atention to it?

A. The shots.

Q. How many shots?

A. Two.

Q. Where were you when you heard the shots?

A. In the quarters.

Q. What part?

A. Kitchen.

Q. How far, approximately, from the two storehouses?

84 A. I would judge about 100 yards.

Q. What were you doing at the time?

A. I think nothing. I had been in there with the cook, pealing some potatoes, but at the time the shots were fired I was doing nothing.

Q. Were you awake?

A. Yes.

Q. Can you state positively whether or not there were more than two shots?

A. There were just two.

Q. At or about the time of the firing of the two shots did you hear anything else?

A. No.

Q. What did you do when you heard the shots fired?
A. Ran out of the quarters to see what it was.
Q. What did you see and what did you do?
A. When I got out of the quarters I looked up the street toward the storehouses and saw men running down there and I went also. I saw two natives lying in the street, and lieutenant was talking to Grafton.
Q. How long after you heard the two shots was until you arrived at the scene of the shooting?
A. Could not say; I suppose probably a few seconds, a minute or not so much.
Q. Where were the two natives lying with relation to the two storehouses?
A. One was up against the south side of the south storehouse and the other was lying in the middle of the street between the storehouses.
Q. Where between the two storehouses in reference to the east and west ends of the storehouses?
A. They were a little east of the middle of the storehouse.
Q. Were they both on line?
A. If I remember right, the one against the storehouse was a little to the right of the other.
85 Q. Do you know where the bullet holes are?
A. Yes.
Q. Taking a line at right angle from the wall across the street where were they?
A. They would be a little east and a little towards the camp.
Q. How much?
A. Not very much; I do not exactly know.

Cross-examination by Mr. Ross:

Q. How many men were in the quarters that day?
A. Twenty-four.
Q. How long did you say it was before you arrived on the scene after hearing the two shots?
A. Something less than a minute.

Corporal JAKE REITER, witness for the defense, after being duly sworn testified as follows:

Q. Where and on what duty were you on July 24, 1904?
A. Corporal of the guard on the beach at Buena Vista.
Q. Do you know Private Homer E. Grafton?
A. Yes.
Q. What relief did Grafton belong to?
A. Number one.
Q. What hours of the day was he on post?
A. From eight to ten and from two to four.
Q. Where was post No. one?
A. Extended in front of Lieut. Harrell's quarters up as far as the coal pile in the daytime and at night every half hour to the dock

Q. Did anything unusual occur on July twenty-fourth?

A. I went to the water-closet just before three and just as I came out there was a step leading to the guard room, at which point I heard two shots; so I grabbed my piece and ran up there and heard Grafton call for the guard. Grafton was on the north side of the road, next to the storehouse, and one of the men wounded was lying in the center of the road between Grafton and the other man
86 against the building on the south side of the road.

(Showing witness Exhibit A.) Is that the knife you saw?

A. Yes.

Q. How was the condition of the knife with reference to its present condition?

A. Looked a good deal the same.

Q. You say you saw this knife lying between the native in the center of the road and Grafton?

A. Yes. A soldier by the name of Faver picked it up and handed it to the lieutenant.

Q. When you heard those two shots fired did you hear anything else at approximately the same time?

A. No.

Q. Did you hear any call by the sentinel at that time?

A. When I got close to him I heard him say, "Hurry up the guard."

Q. How far were you from where the two natives were lying when you heard the shots?

A. About a hundred yards.

Q. How long after the shots were fired before you were outside of the building and in sight of these two natives?

A. I was outside at the time of the firing, but I jumped upon the porch, grabbed my gun, and ran out there.

Q. How much time after the shots before you were in sight of Grafton and the two natives?

A. Immediately afterwards.

Q. Can you state definitely how many seconds?

A. Two or three seconds, probably.

Q. Was there any change of position of the two natives from the time you first saw them and the time that you arrived at the spot—I do not mean their position of body, but their position with reference to the ground.

A. I believe the man shot through the body was reeling and the other was lying up against the wall.

Q. Can you state positively whether there were two or more shots fired?

87 A. Two shots were all I heard.

Q. What was the position of Grafton and the two natives with reference to the two storehouses?

A. Grafton was on the north end a little toward the east, and the natives, one lying in the center of the road and the other lying up against the wall.

Q. Did you see where the bullets entered the storehouse?

A. Yes.

Q. Where was the native in the middle of the street lying in relation to the bullet holes and in relation to where Grafton was standing?

A. I think he laid a little westward, not exactly in line with the sentry.

Q. I wish to know where the native in the road was in relation to the entrance of the shots in the storehouse and where Grafton was standing.

A. The man was lying up against the building on the south side and the other man lay a little westward.

Q. Which way is west, toward the beach or the other?

A. Toward the bay.

Q. Now, suppose a line was drawn from the shots in the south storehouse straight out from the building—that is, perpendicular—where was the native lying, to the east or to the west of that line?

A. To the east.

Q. Suppose you drew a line from where the sentry stood to those holes, where was the body in the middle of the road with reference to that line?

A. A little to the left of that line.

Q. How much do you think?

A. Three or four feet.

Q. If you drew a line at right angles to the wall of the south
88 storehouse across the street to the bullet holes, was the body of the man who lay in the street to the west or to the east of that line?

A. To the east of that line.

Q. How much do you think?

A. Cannot say exactly.

Q. What was the general manner of Grafton when you arrived on the spot?

A. He looked pale; I did not pay much attention to him.

Q. Did he act as though he knew what he was doing?

A. I think he did.

Q. Before this incident happened was there any talk among the enlisted men of the detachment concerning the conduct and bearing of the natives at Buena Vista at that time?

Mr. Ross. Object to the question as irrelevant and immaterial; it has no bearings on this case. Any conversation that might have occurred between the men on that day has no bearing on the case.

Captain NETTLES. It should be taken into consideration in ruling upon this point that the soldier was on duty in a military post in a strange country, making it impossible for him to be personally acquainted with all these natives. He did not know of any specific threats on the part of these natives, but it would be reasonable to suppose that such could have been conveyed to him and under these conditions I submit that the acts unusual on the part of the natives

generally in and around that post sufficient to put a guard upon the alert and commented upon specifically at the same time, is more than competent in examination of the conduct of the accused.

The COURT. I am inclined to believe the question you have made is too broad; in any event I think that if any act had been observed by the defendant to lead him to suppose he stood in danger of assassination, or if any facts had been communicated to him by his
89 superior officer that would lead him to think that a scheme might be on foot to assassinate him at that time, such would be received. That will arise in the determination of this question, the question of this man having acted within line of duty and prudence and with due regards to the rights of others. I think I will hear this testimony.

A. In the morning we were sitting in the guardroom and talked about Samar.

The COURT. Just tell what talk you had with him.

Q. What talk about the people in that vicinity and their actions with the defendant?

A. There were a great many people leaving on boats and more soldiers than usual.

Q. Can you not remember whether you and the accused had any particular talk that morning relative to the attitude of the people at Buena Vista and any unusual acts on their part?

A. Nothing more than people leaving there.

Q. Did the accused make any comments to you in relation to the people leaving or any other acts of the natives on that day?

Mr. Ross. I think the question is legal.

The COURT. You can tell whether there were any remarks between you and the accused about the condition of affairs there and the acts of the people.

A. Nothing, only they looked suspicious.

Q. What did he say and you say?

A. We were talking about Samar was all I know.

Q. Leave out the Samar attack and tell what was said about the people at Buena Vista.

A. He said nothing to me.

Q. What did you say to him?

A. I was not talking to him; we were all talking together.

Q. Was he present?

A. Yes.

90 Q. There while you were discussing Samar?

A. Yes; there was nothing else said that I remember of.

Cross-examination by Mr. Ross:

Do you remember the position in which the body of the man lying in the road was as to whether on his back or side?

A. Reeling, swaying on his side; not exactly rolling over, but just to and fro.

Q. Was he on the ground or partly rising?

(Question withdrawn.)

Q. Was he sitting up?
A. No.
Q. What direction did his feet point?
A. To the eastward.
Q. You said a while ago in your testimony west; you mean toward the bay.
A. Yes.
Q. And he was lying west of a straight line drawn between Grafton and the bullet holes; that is on the side toward the bay.
A. Yes.
Q. Did you see the knife on the ground yourself?
A. Yes.
Q. How near was it to the man?
A. Between Grafton and the man lying on the ground.
Q. How near, which one was it nearest to?
A. I can not say exactly; I just saw it lying there.
Q. How many had arrived there before you did?
A. Lieut Harrell and Captain Davis got there a little ahead of me. Faver and myself got there afterward.
Q. How far had you gotten toward the sentry when he hollowed "Hurry up the guard?"
A. Probably ten yards.
Q. Before that, did you hear him make any outcry?
A. No.
Q. Did you hear him cry out anything except what you have said?
91 A. No.

Corporal C. A. TREADWELL, Co G, 12th Infantry, after being duly sworn, testified as follows:

Questions by Captain NETTLES:

Q. Were you on duty on July 24th, 1904?
A. Corporal of the guard, Buena Vista.
Q. Do you know Private Homer E. Grafton?
A. Yes.
Q. Was he a member of your guard that day?
A. Yes.
Q. What relief did he belong to?
A. First.
Q. Did you in your official capacity as corporal of the guard place him on post in the afternoon of July 24th?
A. Yes.
Q. Did anything unusual occur on that afternoon?
A. Yes.
Q. What happened?
A. Two natives were shot.
Q. Where were you when this shooting took place?
A. In the storehouse.

Q. Which storehouse?

A. One on the south side of the road.

Q. How far were you at the time of the shooting from the position where the two natives were found after you went out of the door?

A. I should judge about fifteen feet from one and about five or six feet from the other.

Q. Do you know who did the shooting?

A. No.

92 Q. How many shots were fired?

A. Two.

Q. Are you sure there were only two shots?

A. Yes.

Q. Can you state positively whether there more or less than two shots fired?

A. There were only two shots fired.

Q. At or about the time of the two shots, did you hear an outcry of any kind?

A. No.

Q. Right at the time of the shots did you hear an outcry?

A. I heard him say something, but could not say what it was—it was indistinct.

Q. What did you do after you heard the two shots?

A. I came out of the storehouse.

Q. Which door did you come out of; one to the east of Lieut. Harrell's quarters or the one towards the west, toward the beach?

A. The one toward the west.

Q. When you came out, what did you see?

A. I saw two natives lying on the ground who had been shot.

Q. How long after the two shots were fired was it before you got out of the door?

A. About a minute.

Q. How did it happen that you did not get out sooner?

A. I was awaiting developments; I thought in case of any more trouble I would get something to protect myself.

Q. When you got out of the door, were the two wounded natives to the east or west of the door?

A. East of the door; one about six ft. and the other about 10.

93 Q. Do you know where the two shots went?

A. To the east of the door through the corrugated iron, about two feet from the ground.

Q. Where was the native nearest to the door lying with reference to the bullet holes?

A. I do not know.

Q. Can you tell if he was near?

A. Yes; near the wall.

Q. Was he east or west, or just opposite to the bullet holes?

A. West of the bullet holes.

Q. Now, the native in the middle of the road; where was he with reference to the bullet holes, to the east or west?

A. East of the bullet holes a trifle.

Q. Where was Grafton?

A. A little to the west and towards the pier from the natives.

Q. From what natives?

A. The one in the road and also the one against the wall.

Q. Was there anybody else there at the time?

A. Just as I came out Lieut. Harrell came out.

Q. Did he arrive before or after you?

A. At the same time.

Q. What was Grafton doing when you first saw him?

A. Standing near the center of the road, facing a southeasterly direction.

Q. Who was the nearest to Lieut. Harrell's quarters, the natives or Grafton?

A. The native lying against the storehouse.

Q. How long had you been in the storehouse before the two shots were fired?

A. About one-half a minute, I should judge.

Q. Where did you come from?

A. The guardhouse.

94 Q. Did you see Grafton while you were coming from the guardhouse to the storehouse?

A. Yes.

Q. Where was he?

A. I passed him on his way down to the storehouse about one-half way between Lieut. Harrell's quarters and the storehouses.

Q. Did you have any conversation with him?

A. Yes.

Q. Did Grafton in the line of duty make any report to you?

A. Yes.

Q. When did he make this report?

A. While I was going down to the storehouse.

Q. How long before the shooting?

A. About 3 or 4 minutes, I should judge.

Q. What was that report?

Mr. Ross. Object on the same grounds as before.

A. He reported to me that he saw two men get out of a boat, near the beach, who had bolos on them, and that they crossed his post and went up the hillside, and if I did not report the matter to the commanding officer he would when he came off post.

Q. Did he report anything else relative to the conduct of the natives in and about Buena Vista at that time?

A. He said things looked very suspicious around there and a good many natives were leaving town.

Q. At that same time?

A. Yes.

Q. What was the manner of Grafton when you saw him immediately after the shooting?

A. He seemed agitated and nervous when I came out of the storehouse.

Q. Did he appear as though he knew what he was about?

A. Yes.

95 Q. When you saw Grafton and he made that report, which way was he going on his beat?

A. He walked with me down toward the storehouse.

Q. Where is the door you came out of, the one just this side of the bullet holes?

A. Yes.

Q. You say the door was shut and fastened inside?

A. It was locked. I unlocked it when I went inside.

Cross-examination by Mr. Ross:

Q. You left it open?

A. I shut it.

Q. Grafton knew you were inside of the house?

A. Yes.

Q. And when you first saw him he was standing nearer to the bay than to the man lying in the middle of the road?

A. Yes.

Q. To the west of the door?

A. Yes; toward the west of the natives.

Q. With reference to the door, where was he, on the side towards the bay, or Lieut. Harrell's quarters?

A. Almost opposite.

Q. How far was he from the corner of the building nearest the bay?

A. I could not say, exactly. I do not recollect how far it is from the door on the west end.

Q. The questions is how far was Grafton from the end of the building when you saw him?

A. Some 15 or 20 ft.

Q. Did you hear him order these natives to halt before he fired upon them?

A. No; I did not hear anything distinctly.

Q. How many men were there on guard that day?

A. 6 privates and 2 noncommissioned officers.

Q. How many men in the detachment?

A. 24, I believe.

96 Q. I understand you took no action on the remarks Grafton made to you about the two men with the bolos?

A. No.

Q. Did not pay any attention to it?

A. Yes; but I did not have time to take any action.

Q. What day of the week was that?

A. Sunday.

Q. Is it not a fact that on Sunday there is a great deal of moving there, the natives going to the cockpit?

A. A great deal of travel on that day.
Q. Is there not generally on Sunday?
A. Cannot say.
Q. Did you not observe on Sunday a great many people coming over to Iloilo?
A. Never had occasion to observe anything only on that day.
Q. Is it unusual to see natives with bolos?
A. Yes; except working bolos.
Q. Yes; but is it not quite common to see natives going around with working bolos?
A. Yes.
Q. How far was that from the company's quarters?
A. I should say 110 to 115 yards.
Q. Is it not a fact that immediately after the shooting the most of the men came to the scene?
A. Yes.
Q. How long after the shots were fired before they arrived?
A. About a minute; it might have been less.
Q. Are you acquainted with the location of the barrio of Salog?
A. No.
Q. Do you know a little barrio there north of the bay?
A. I know there is a barrio around the storehouse.
Q. Is there a little barrio up there near the soldiers' quarters, not a great distance from their quarters, moving up the hill?
A. No.
97 Q. You know where Buena Vista is?
A. Yes.
Q. Is it not true that this road in which the shooting occurred is the road commonly used by the people passing from Buena Vista down to the water front?
A. Yes.

Redirect examination by Capt. NETTLES:

Q. How long did you say you had been in the warehouse before the shots were fired?
A. 3 or 4 minutes.
Q. After you went in the door how were the shots fired?
A. 3 or 4 minutes.
Q. From what direction did you come?
A. From the guardhouse.
Q. Were you walking toward the pier or dock?
A. Yes.
Q. Did you look in that direction as you walked up there?
A. No; do not remember that I did.
Q. Did you see any natives on the road?
A. No.
Q. You have stated you came out of the building about a minute after the shots were fired?
A. Yes; or less.
Q. Who were there besides Grafton and the two natives?

A. Just as I came out Lieut. Harrell and Sarg. Reiter and some members of the guard were coming up.

That's all.

Private SAMUEL BENNETT, Co. G, 12th Infantry, after being duly sworn, testified as follows:

Questions by Captain NETTLES:

Q. Where and on what duty were you on July 24, 1904?

A. Attached service, Buena Vista.

Q. On what duty were you on that date?

A. Guard.

Q. What relief did you belong to?

A. Second.

98 Q. What time were you on duty in the morning?

A. From ten to twelve.

Q. Did anything unusual occur that day?

A. First about eleven thirty, I was walking post and walked down to the coal pile. Two men came and told me that two natives down there on the dock wanted to fight with bolos; and I said if they do I will put them in the guardhouse. These men went away and came back with a bolo concealed, the handle of it sticking out of their clothes. After he passed me I followed him, thinking there would be trouble. They noticed me coming down and I got within about thirty-five yards and loaded the chamber of my gun and put in shells. They saw me and went around behind the house. I went down on the lower dock and at that time they were all out of sight. I walked around to where I could see them and asked them what they were doing there with bolos. They said they did'nt have any bolos, but I told them I had seen them with bolos. I chased them off the dock and looked around for the bolos, but could not find them. I don't know what they did with them unless they threw them in the bay.

Q. Did you tell Grafton about this before he went on duty that afternoon?

A. Yes; just as soon as I went off post.

Q. What was said, if anything, between you and Grafton concerning the suspicious actions or otherwise of the natives of Buena Vista?

A. We were talking about the natives how they were going away that day. There would be a lot of women leave, going toward Iloilo and a lot of men come back.

Q. Where were you when the shooting took place?

99 A. In the guardhouse.

Q. Did you hear the shots?

A. Yes.

Q. How many?

A. Two.

Cross-examination by Mr. Ross:

Q. You say you chased these men off the dock?
A. Yes.
Q. And you were not afraid of them?
A. No.
Q. And you chased the whole five of them off?
A. No; they went off when I told them to.
Q. How long had you been in Buena Vista before July 24th?
A. Three days.
Q. Had you ever been there on Sunday before?
A. No.
Q. What did you do when you heard the shots?
A. I got up and opened the door about the time the shots were fired. I heard some noise and looked out and saw the man. Came back, got my gun and went down there.
Q. Where were these men when you went down there?
A. One against the storehouse and the other in the road.
Q. How far in the road?
A. A short distance.
Q. Where was Grafton?
A. About six feet from the man lying in the road.
Q. On what side of the man lying in the road?
A. Grafton was nearer the guardhouse.
Q. How far.
A. About six or eight feet.
Q. From the man.
A. Yes.
That's all.

100 EDWARD J. LITTLE, Co. G, 12th Infantry, quartermaster-sergeant, after being duly sworn, testified as follows:

Questions by Captain NETTLES:

Q. How long have you been q. m. sergeant Co. G?
A. Three months.
Q. What was your position prior to that time?
A. First sergeant.
Q. Do you know Private Homer E. Grafton?
A. Yes.
Q. How long have you known him?
A. Since February, 1904, when he joined us in Salt Lake City.
Q. What do you know as to his character?
A. It is excellent. When I was first sergeant, I knew Grafton, and his reputation was that of a man who never drinks. I always mixed up with the men, and if he had taken anything or shown any effects of it I would have known it.

Cross-examination, Mr. Ross:

Q. Do you regard him as a steady man?
A. Yes; one of the steadiest in the company. He is a man that is

a man. You can trust him with any duty. He will carry out any orders given him.

Q. Do you consider him a man that would act with judgment and deliberation?

A. Yes.

Q. Do you consider his conduct on that occasion such that would indicate he did not possess the ordinary amount of courage?

A. No.

101 Q. What has been your observation as to that?

A. If I had been called out and in an attack I would have put him one of the first.

Q. And you regarded him as a man of more than ordinary firmness?

A. I regarded him as a man I could trust, and would like to have him on detail at any time, and he would not get rattled.

Q. You estimated his character as being steady, calm, and courageous?

A. Yes.

That's all.

Private HOMER E. GRAFTON, defendant, takes the stand in his own behalf, and after being duly sworn testified as follows:

The COURT. You are not compelled to testify in this case, but whatever proper questions are asked you you will be compelled to answer.

Questions by Captain NETTLES:

Q. What is your occupation?

A. Soldier.

Q. What company and regiment?

A. Company G, 12th Infantry.

Q. Where were you born?

A. Illinois.

Q. Where were you on July 24th, 1904?

A. Buena Vista landing.

Q. State what duty you were doing on that day.

A. Guard duty.

Q. What relief of the guard?

102 A. Number one.

Q. What was your post?

A. Number one.

Q. Describe that post.

A. The post extended from the hydrant to the coal pile in the daytime and from the hydrant to the coal pile at night and every thirty minutes to the pier and around to the storehouse.

Q. What difference, if any, is there in the path of post No. 1 as walked on July 24th and as walked at the present time?

A. There is considerable difference.

Q. Describe it.

A. The post as it is to-day is walked up and down the middle of the road as existed on July 24th from the east end of the storehouse to Lieut. Harrell's quarters, it was on the left of the road facing

toward the coal pile. The path was off the road because the road is of hard gravel, the path being on the left hand side.

Q. Until it reached the storehouse, how did it continue?

A. There were first stones. The prolongation of this road that was built down to the storehouse was of crushed stone. I walked to this corner of the storehouse and then went across these crushed stones.

Q. How many feet did the prolongation of the path run towards the storehouse?

A. About six feet.

Q. Starting at Lt. Harrell's quarters and coming toward the beach, would you come on the right or left side?

A. To the left hand side.

103 Q. What suspicions or peculiar actions, if any, did you observe on July 24th on the part of the natives in and around Buena Vista?

A. I noticed a number of the natives were leaving the town, and their general appearance as they moved around was rather suspicious.

Q. Did you make any report to the sentinel relieving you the conditions and observations you had made?

A. Yes; to the corporal of the guard.

Q. At what time?

A. After I was on post at two o'clock, along towards three in the afternoon, he came from the quarters going toward the storehouse and I was coming from the end of my post. When I met him I reported what I had seen.

Q. Upon going on guard that day were the sentinels posted with or without bayonets?

A. I do not know; it was left to their discretion.

Q. When you went on guard at two o'clock did you have your bayonet?

A. No.

Q. When you went on your post at eight in the morning did you load your piece or not?

A. No.

Q. Did you fill in your magazine in the morning?

A. No.

Q. When you went on at two o'clock did you fill your magazine or load your piece?

A. Yes.

Q. You are charged in this case, as you are aware, with the killing of Felix Villanueva. State in detail all that transpired in relation to the shooting of this native.

A. I was at the east end of my post about starting to the west post. I arrived at about half way between Lt. Harrell's

104 quarters and the storehouse. Two natives came out on my post about half way between the storehouse and the coal pile on the left. They had climbed over the stone wall and passed over my post. They advanced directly toward my post. When I arrived

at the corner of the storehouse they were about the corner of the same storehouse at the other end. Just as I started to cross those stones, a native reached in his bosom and pulled out a knife and immediately he changed the handle and concealed the knife upon his arm from my view. Upon seeing that I looked back toward the building on the right on the road coming toward the dock and upon getting near the building they had arrived at a place to my left. Upon gaining this position, the native turned the knife with the point toward me and made a rush at me. At the same time the other native followed close to him. At the time he did this I brought my piece to my shoulder, threw a cartridge in the magazine and fired at him. The other native jumped back toward the quartermaster building. I loaded my rifle and fired at him. Immediately after firing at the second native I hollowed for the guard. As soon as I hollowed for the guard I looked down in the direction the guard was coming from.

Q. Did you see any other natives in sight at the time?

A. No.

Q. How many shots did you fire?

A. Two.

Q. Are you positive about the number of shots you fired?

A. Yes.

Q. Which native did you shoot first, the one in the middle of the road or the one near the storehouse?

A. The one in the middle of the road.

105 Q. Which one had the knife?

A. The one in the middle of the road.

Q. How close was he to you when you fired?

A. About four paces.

Q. How near was he to you when he fell?

A. Not over five paces.

Q. How near did the knife drop to you?

A. Dropped about midway between us.

Q. After you fired upon these two natives did you look toward the dock?

A. Yes, I looked all around.

Q. On looking around at that time, how many natives did you see down toward the dock?

A. None.

Q. What natives, if any, after firing these shots did you point your piece at?

A. No other than these two.

Q. Why did you shoot these two natives?

A. Because they were trying to do me an injury—trying to assassinate me.

Q. Could recognize the knife if it were shown you, with which you state one of them had on that day?

A. Yes.

Q. Is this the knife [showing him Exhibit A]?

A. Yes.

Q. Did you consider yourself in danger of loss of your life at the time you fired this first shot?

A. Yes.

Q. Also, at the time you fired the second shot?

A. Yes.

Q. When you looked back, as you testified, how many feet did you go from your path of your post as it was walked at that time?

106 A. About fifteen or eighteen feet.

Q. Then you went about fifteen or eighteen feet away from the path of your post?

A. Yes.

Q. Why did you do that?

A. When I saw the native draw this knife and conceal it I was not going to walk upon the post because I felt sure he would do me an injury. I gave him the right of way, and if he intended to do me an injury he would leave the path he was walking down.

Q. Have you observed the bullet holes in the wall said to have been made by the bullets you fired?

A. Yes.

Q. In relation to that point and a line drawn perpendicular across the road, describe the location of the native at the time you fired.

A. The natives were on the east side of the line.

Q. And where were you at the time you fired the shot?

A. I was to the east of that line.

Q. And were you east or west of the two bodies?

A. A little east, toward Camp Jossman.

Q. After you fired the shots and until the arrival of Lieut. Harrell, how far did you move from the spot from which you fired the shots, if you moved at all?

A. If I moved, it was not over two or three paces in either direction.

Q. Why didn't you halt these two natives?

A. There is no orders for challenging in the daytime. That is a through path for natives to go through.

Q. You say there are no orders for halting in the daytime?

107 A. No.

Q. But you state they attacked you. When they advanced in their atack upon you, why didn't you halt them instead of firing?

A. There was no time for halting.

Q. What were your orders as sentry on post No. 1?

A. Orders were divided in two classes, special and general. General orders: Take charge of this post and all Government property; walk my post in a military manner, keeping constantly on the alert, observing everything at the docks and within hearing; repeat all calls of the post more distant from the guardhouse than my own; to

quit my post only when properly relieved; receive, transmit, and obey all orders from and allow myself to be relieved by the commanding officer of the day, an officer or noncommissioned officer of the guard only; to hold conversation with no one except in the discharge of my duty; in case of fire or disorder to give the alarm; allow no one to commit a nuisance in the vicinity of my post. In any case not covered by instructions call the corporal of the guard. At night, exercise the greatest vigilance between retreat and broad daylight, at times designated by the commanding officer, and challenge all persons seen on or near my post and allow no person to pass without the proper authority. Special orders: Post No. 1, extending from hydrant to coal pile in the daytime. From hydrant to coal pile at nighttime, and every thirty minutes around the two quartermaster buildings; to allow no property to be loaded on boats or touched, meddled, or handled in any way except by orders of the officer in charge or his assistant; allow no assemblage of natives upon reservation, other than the employees of the quarter-
108 master's department; allow no native boats to some alongside the pier at all. In case the quartermaster's boat was approaching, notify the corporal of the guard, who will send members of the guard to be at the landing in time to tie it up; natives passing through the reservation will be confined strictly to the road. Natives will not be allowed to take water from the hydrant. In case the telephone bell rings three times notify the corporal of the guard.

Q. How long have you been in the military service?

A. Four years.

Q. What regiment did you serve in before you joined the 12th Infantry?

A. The Ninth Infantry.

Q. Where?

A. One year in China and one year on the island of Samar.

Q. Have you those discharges with you?

A. No.

Q. Did you consider yourself in the execution of your duty when you fired the two shots?

A. Yes; I was in the execution of my duty.

Q. Had you ever seen before the natives whom you shot on July 24th?

A. No; not that I remember of.

Q. Did you know them by sight or name?

A. No.

Q. After the shots were fired and the natives fell to the ground, did they move from the spots where they fell prior to the arrival of Lt. Harrell?

A. No.

109 Q. What is this paper I show you?

A. My discharge.

Captain Nettles reads the discharge: "Army of the United States, to all whom it may concern: Know ye that Homer E. Grafton, private, Co. G, Ninth Regiment of Infantry, enlisted July 11, 1900,

has served three years, is hereby honorably discharged from the Army of the United States by reason of expiration of the term of enlistment. Said Homer E. Grafton was born in Clinton County, Illinois, and when enlisted was twenty-one years and five months old, five feet nine inches high, fair complexion, blue tint eyes, light-brown hair, and a farmer by occupation. Given under my hand at Madison Barracks, New York, July 10, 1903. Signed Charles Rebe, Colonel Ninth Infantry. Character excellent.

"C. R. Noise, captain, 12th Infantry, commanding Co. G. Military record: Previous service, completed three years of continuous service July 10, 1903. Noncommissioned officer, corporal from July 22, 1902, to February 16, 1903; reduced at his own request. Marksmanship, third class, 1902. Battlements and engagements, skirmishes and expeditions: First expedition to China; next expedition to Samar, P. I., 1900, to May 13, 1901. In engagements Basay and Balingiga, Samar, September 30, 1901. Engagement near Langara October 22, 1901. Remarks: Service honest and faithful.

"C. R. Nois, captain, Ninth Infantry, commanding Co. G,
110 United States Army, recruiting station, Springfield, Mo., July 23, 1903. Reenlisted by me this date for infantry. S'gn'd S. N. English, first lieut., Ara. Corps."

That's all.

Cross-examination by Mr. Ross:

Q. Wish you would state what particular acts you observed on the part of the natives around there that made you suspicious.

A. I noticed the natives leaving Buena Vista in boats. They would take away a number of women, and when the boat came back it would be loaded with men. The boat sailed toward Panay. I also noticed some three natives that had concealed bolos about them and a strange action among a majority of the natives that traveled about that day.

Q. Strange in what way?

A. Appearing shy or in passing made many glances toward us, especially when passing us on post.

Q. Is that all you remember? Is it not true that there was an excursion leaving Guimaras on that day on the steamer "Paul Revere," and many people were leaving on that account?

A. There was an excursion boat.

Q. Great many people were leaving on that, were they not?

A. Not that I noticed.

Q. How far were these two men from you when you first noticed them?

A. I was halfway between Lt. Harrell's quarters and the east end of the storehouse, and they came out halfway between the coal pile and the west end of the storehouse. I do not know how far that is.

111 Q. Did you at this moment notice anything about these men which aroused your suspicions as to their intentions?

A. No.

Q. Where were they when you first noticed the knife?

A. I was at the east corner of the storehouse, and they had arrived at the west corner, and one of them pulled a knife from his bosom.

Q. When you saw the man take the knife from his bosom and hold it in his hand, did you at that moment believe he intended to attack you with the knife?

A. Yes; I thought it strange enough not to go directly on my post.

Q. Take the knife and illustrate the position in which he held it when you first saw it just as he drew it.

A. (Defendant indicated position as requested.)

Q. Now, are you positively certain as to which one of these natives had the knife?

A. I do not know them by name.

Q. You have testified that the one who fell in the middle of the road, who was Florentino Castro, was the one who had the knife; now, are you sure about that?

A. Yes; I am perfectly sure.

Q. What distance was from him to you when he changed the position of the knife as you state?

A. Not more than seven or eight paces.

Q. Take the knife and show the court how he rushed at you and changed the position of the knife.

A. (Defendant indicates the position.)

Q. Was he running when you shot him?

A. Yes.

112 Q. At what distance was he from you at the moment when you fired?

A. About four paces.

Q. Did he drop right where you shot him?

A. Yes; practically.

Q. What was the other man doing at this time?

A. The other man followed right behind him on the run.

Q. Where was he when you shot him, what distance from you?

A. I do not know exactly [but indicated the distance about thirty-five feet].

Q. Was he coming towards you when you fired at him?

A. No.

Q. He jumped back toward the quartermaster's building, didn't he?

A. Yes.

Q. Before you fired?

A. Yes.

Q. Did he have any weapon?

A. Not that I saw.

Q. Show the court the position he was in when you fired, as you recall it.

A. He was crouching.

Q. Illustrate the position.
A. (Defendant shows the positions.)
Q. How long an interval was there between the two shots?
A. Time to load my magazine.
Q. Almost instantly?
A. There had to be a little space of time to work the magazine.

Q. You say that first he started running towards you a
113 little to the right and to the rear of the other man, who was rushing upon you with a knife?

A. Yes.
Q. When did he change his attitude and start the other way?
A. When I fired the first shot.
Q. I believe you said he had no weapon in his hand or on his person—the one that ran toward the warehouse?
A. I did not see any.
Q. Who was the first person to arrive upon the scene after the shooting?
A. Corporal Reiter; immediately behind him Lt. Harrell.
Q. The corporal was there before the lieutenant.
A. Yes.
Q. What was the distance from you to the man crouched against the wall at the time you fired?
A. Approximately twenty or twenty-five feet.
Q. Is it your custom to carry your rifle with the magazine loaded?
A. Not all the time.
Q. What was your practice after that ordinarily when on guard?
A. There were times I loaded my magazine on guard.
Q. Did your orders require you to carry your magazine loaded in the daytime?
A. No.
Q. On the contrary, were there not orders that you should not carry your piece loaded in the daytime?
A. There were no orders that they should or should not be loaded.

114 Mr. Ross. That's all.

Redirect examination by Captain NETTLES:

Q. How many seconds elapsed between the arrival of Corporal Reiter and Lt. Harrell?
A. Four or five.
Q. Captain NETTLES. That's all.

Private CHARLES A. FAVER, Co. G, 12th Infantry, witness for the defence, after being duly sworn, testified as follows:

Question by Captain NETTLES:

Q. Where were you on July 24th, 1904?
A. On guard.

Q. Where?

A. In the guardhouse, doing guard at the beach, at Buena Vista, Guimaras.

Q. Where this instance happened that Grafton is on trial for?

A. Yes.

Did you hear the shot?

A. Yes.

Q. How many were fired?

A. Two.

Q. What did you do when you heard the shot?

A. I took my gun and ran down where the shooting was.

Q. When you got there what did you see?

A. Two natives lying on the ground and a knife lying close behind the wounded man and the sentry.

Q. There were two natives lying on the ground?

A. Yes, sir.

115 Q. Where were those two bodies lying, in reference to the warehouse?

A. One in the middle of the road and the other about five paces away.

Q. Near which one of these natives was the knife found?

A. Near the one in the middle of the road.

Q. What did you do with the knife?

A. Picked it up and handed it to Corporal Reiter.

Q. How near did that knife lie to the man on the ground?

A. Between his knees and his feet.

Q. Did you notice a sheath for the knife?

A. No.

Q. Did he have a belt on?

A. No.

Q. That's all.

Captain NETTLES. I would like to offer in evidence a certified copy of the proceedings before military court for this offence. There is in evidence a certified copy of the judgment, but I would like to submit a certified copy of the proceedings.

Mr. Ross. I object to that. The only purpose to any part of the record could serve would be to prove he was tried by a military court and that is already in the record.

The COURT. I do not think the evidence taken there could be offered as proof in this court. I think under my understanding of it I will have to reject it. I do not mean to exclude that part that has already come to the knowledge under the other plea

116 that has already been received. This in addition to that contains the evidence taken before the court-martial and different in no other way.

Captain NETTLES. Defense rests.

SANTOS ESPINOSA, witness called for the Government, after being duly sworn, testified as follows:

Questions by Mr. MONTINOLA:

Q. Where were you on July 24th?
A. On the dock.
Q. How many shots did you hear?
A. Three.

Cross-examination by Lt. SHIELDS:

Q. Where were you when the shots were fired?
A. In my house, where I had gone to have my dinner at about two thirty.
Q. How far is your house from the dock?
A. Can not estimate it.
Q. In what barrio is your house situated?
A. Santa Rosario.
Q. How long would it take you to walk from the dock to your house?
A. I can not fix the time.
Q. When did you go to your house that day to get your dinner?
A. In went home and took a little rest and had my dinner at two thirty.
Q. How many minutes after you got home before you had
117 your dinner?
A. I do not know.
Q. Is it not a fact that it takes a half an hour to walk from the dock to your house?
A. No.
Q. Does it take fifteen minutes?
A. I do not know.
Q. Five minutes?
A. I do not know.
Q. Can you walk there in one month?
A. I can not estimate.
Q. How long have you lived in that house?
A. More than two years.
Q. And you were at your house when you heard the shot fired?
A. Yes; having my dinner.
Q. Who told you there were three shots fired?
A. I heard them myself.
Q. What did you do when you heard these shots fired?
A. I drank water and left my house.

Redirect examination by Mr. MONTINOLA:

Q. Can you fix from this door the distance from your house to the storehouse where these men were shot?
A. No; but my house is on a straight road from the storehouses. That's all.

MARTIN MULLER, witness for the Government, after being duly sworn, testified as follows:

I live in Iloilo, Calle Rosario, No. 18. Inspector for J. G. White & Co.

118 Questions by Mr. Ross:

Q. Where did you reside on July twenty-fourth of this year?

A. In Buena Vista, Guimeras.

Q. Were you there on that day?

A. I do not know whether it was that day.

Q. Were you there on the day the killing of the two natives?

A. Yes.

Q. What day of the week was that?

A. Sunday.

Q. How long had you resided there?

A. 1½ years.

Q. Did you notice anything suspicious on the part of the natives that day that would indicate there was going to be trouble?

A. Nothing out of the ordinary.

Q. Did you notice anything unusual in the conduct of the people?

A. No.

Q. Do you know if there was any occasion for a considerable number of people leaving the place that day?

A. Nothing more than the usual Sunday excursions and going to the cock pit.

Q. Have you ever served in the army in the Philippines?

A. Yes; two years.

Q. Actual service in the time of war?

A. Yes.

Mr. Ross. That's all.

SERGIO CONSING, municipal presidente of Buena Vista, called as a witness for the Government, and after being duly sworn, testified as follows:

Q. Where were you on July 24th, 1904, when this shooting occurred?

A. I did not hear the shots; therefore could not tell where I was.

Q. Did you have any information about what happened?

A. Yes; on or about three thirty that afternoon I received a
119 letter from the lieutenant of the barrio saying that two natives had been shot. This was on Sunday.

Q. Where were you on that day?

A. In the municipal building when I received the letter.

Q. In the town of Buena Vista?

A. Yes.

Q. Has anybody else told you about this event except what you learned from the letter of the lieutenant?

A. In the afternoon of the day I went to the barrio of Santa Rosario to obtain information as to what had happened. A person

by the name of Macario, also an employee of the quartermaster's, told me he had been with Ambrosio when this occurred.

Captain NETTLES. I object to the witness going ahead and relating his conversation.

The COURT. I suppose it competent for him to state that Macario gave him an account of the fact. Ask him if he did.

A. Yes.

Q. Is this the man [indicating Macario, a former witness]?

A. Yes.

Q. Who was present when he told you about this matter?

A. The vice-presidente, who was the man in charge of that district.

Cross-examination by Captain NETTLES:

Q. Do you know Captain Hutton of the 12th Infantry?

A. I know several captains, but not by name.

Q. Did you see the large captain that was here and testified this morning?

120 A. Yes.

Q. Do you know him?

A. Yes.

Q. Is it not a fact that Captain Hutton came to your house to get information concerning the killing of these two natives?

A. He came to inform me that this case was to be tried before a court-martial in Camp Jossman, and that any private citizen was authorized to assist at the trial, and told me that the public could come there and see that the military tribunal act impartial in the case, and he told me to present all the evidence that would clear up the matter. I told him that I, on my part, had no interest in the matter, as I was convinced that the American tribunal would act impartially in reference to the evidence. I told him that as the deceased had been laborers, their companions working with them could testify.

Q. Did not Captain Hutton ask you for the names of any witnesses to the act if you knew any?

A. I do not remember of his putting that question to me.

Q. Why did you not give him the name of Macario on that day?

A. I did not give any name, but I told him some of those laborers might know something about it.

Q Did you not tell Captain Hutton that you did not know the names of any of the witnesses to the act on that day?

A. No; he did not ask me.

Q. Why did you not present this witness before the general court-martial when you were advised that this man was to be tried?

Mr. Ross. Object, as question is immaterial.

121 (Question withdrawn.)

Q. Why did you not inform Captain Hutton of this witness and have this witness at the trial?

A. I did not think that captain came to my house for the purpose of getting information from me, but merely came there that I should notify the public that a hearing should take place.

Q. Did not Captain Hutton ask you specifically for the names of any witnesses to this affair?
A. No.
Mr. Ross. The Government has no more evidence.

Lieut. HARRELL recalled by Captain Nettles.
Q. Do you know the witness Santos?
A. Yes.
Q. Do you know where he lives?
A. Yes.
Q. How far is his house from the storehouse dock?
A. On a line six or seven hundred yards.
Q. Is it that far from the dock or from the storehouse?
A. From the storehouse.

Cross-examinaton by Mr. Ross:

Q. Is it not a fact that the report of the U. S. magazine could be heard at a distance of more than six or seven hundred yards?
A. Yes.
Q. A line from the storehouse to his house would cross the bay, wouldn't it?
A. Yes.
Case closed.

I certify that the foregoing pages from one to one hundred and twenty-four inclusive, to be a true and correct transcription of the notes taken by me in the case.

C. G. MURRAY,
Stenographer, Fifteenth Jud. Dist.

122 Afterwards, on the 11th day of December, 1904, the following decision was rendered by the Court of First Instance, to wit:

United States of America, Philippine Islands. Court of the First Instance, Province of Iloilo.

UNITED STATES
vs.
HOMER E. GRAFTON.

DECISION.

This is a complaint against Homer E. Grafton, a private in Company G, of the 12th United States Regiment of Infantry, for the crime of assassination, alleged to have been committed at Buena Vista, on the island of Guimeras, in the Philippine Islands, on the 24th day of July, 1904, by shooting and killing one Felix Villanueva, a native Filipino. The case came on for trial on the 2nd day of December, and occupied the time of the court during the 2nd, 6th, 7th, and 8th of December.

The defendant demurred to the complaint upon the ground that the court did not have jurisdiction to try the offense, and as an American citizen demanded the right of trial by jury, and pleaded in bar a former trial for this offense by a general court martial and an acquittal at said trial. All these defenses are referred to, and will be found stated at length in the general record of the case. All were overruled and denied by the court, and thereupon the defendant pleaded "not guilty" to the complaint and was placed on trial on the merits thereof on the said 6th day of December. Upon the trial the following facts were developed by the testimony and are found by the court:

The defendant is a private soldier in Company G of the 12th Regiment of Infantry in the United States Army. With his
123 regiment he was on duty at Camp Jossman, in the island of Guimeras, and had been there several months. Prior to the 24th day of July, 1904, a detachment numbering twenty-four men was detailed from said company, the defendant being among that number, to do guard duty upon a military reservation at Buena Vista, on said island. Said military reservation contains a highway, leading from the landing place at Buena Vista to Camp Jossman, and has been regularly reserved for military occupation under the provisions of the law governing such reservations, and was so occupied on and before the 24th day of July, 1904. On that day the defendant was detailed for guard duty, and was placed on post one, in the first relief of said guard, his hours of duty being from 8 o'clock in the morning to 10, and from 2 p. m. to 4 p. m. of said day. His post extended from a hydrant in front of the officers' quarters along said highway to a certain coal pile, situated at the end of said dock, a distance of about 140 yards. Upon said highway, at a distance of about 40 or 50 yards from said hydrant, the Government has two quartermasters' storehouses, one on each side of said highway, standing opposite each other, with a roadway passing between them about 40 feet in width. Among his duties was to guard said coal pile and said storehouses and their contents. The path along which sentries on said post were accustomed to travel ran from said hydrant along the southerly side of said highway to the easterly end of the storehouse on the southerly side of said highway, thence along said highway parallel with the southerly storehouse and between them, at a distance of 12 or 15 feet therefrom, to the westerly end of said storehouse, and thence along said highway to the coal pile. The public were permitted to use said highway without hindrance or
restriction by the military authorities, except natives were not
124 permitted to congregate therein, or loiter about said Government property, or commit any nuisance thereon, or any breach of peace. The detachment had been in performance of that duty for three or four days. The defendant had served with "excellent" record in the United States Army in the Philippine Islands for a term of more than four years, including a former enlistment. He is a native American, above medium stature, about 26 years of age, and

apparently of more than average strength and physical ability, and of good intelligence, and has been regarded by his officers as a steady, capable, and efficient soldier, not easily excited or thrown off his guard.

During the forenoon of the day in question some remarks had been made in his presence about the peculiar actions and appearances of the native population on that day, and he himself had observed a considerable number of natives, including women and children, embarking from that port, apparently going to the island of Panay, and had observed the return of several boats manned with men. Among that number he observed three on one occasion with bolos, who had gone into the woods upon a hill not far from his post, and had observed furtive glances by the natives toward the soldiers, and especially toward the sentry upon his post, and had apparently gotten into a somewhat nervous and apprehensive condition of mind. During the first turn upon his post, from 8 to 10 a. m., he carried his gun without being loaded, but when his second turn of duty arrived, in consequence of suspicions raised or some other reasons which do not appear, he loaded the magazine of his piece, which was a .30 calibre U. S. magazine rifle. While walking his post, and just before the occurrences which will be stated hereafter, he had called the attention of the corporal of the guard, in whose charge he was, to his suspicions, and stated to the corporal what he had seen and requested the corporal to report it to the commanding officer, saying if the corporal did not report it he himself would as soon as he was relieved.

I am satisfied upon all the evidence that these suspicions and fears were imaginary and that the evidences of them upon which he acted and formed his conclusions were not sufficient to justify the conclusions and beliefs that he in fact entertained; that the appearances which he observed were magnified in his own apprehension and were only such as are common and natural in that locality on that day of the week, it being Sunday; that the alleged suspicious circumstances and appearances were not sufficient to cause apprehension of any danger in the mind of a prudent and reasonable man of ordinary firmness and observation, acting reasonably and prudently, of any unusual danger, or to cause apprehensions of an attempted attack on the guard or attempted injury to the detachment or property in question in this case. However, I am satisfied that he entertained those nervous apprehensions and fears, and was suspicious that some attempt was brewing by the natives to massacre the guard, of which he was a member.

Shortly before 3 o'clock in the afternoon the defendant was walking his beat, going from the hydrant toward the dock along the path on the southerly side of the highway, easterly from the easterly end of the storehouse on the south side of the highway in question, when he saw approaching him two natives, one named Felix Villanueva, for whose murder he is now on trial, and the other named Florentino Castro. They were coming toward him from the westerly end

of the storehouse, about the same distance from the storehouse that he was and along the road in question and over the road which he would pass in walking his beat. Being suspicious and alarmed in the manner aforesaid, he watched their movements with con-
126 siderable jealousy. As he approached the easterly end of the storehouse and was near to it they came to the westerly end and at the rate both were going would meet about the middle of the storehouse, between the two, on the highway. Their path led along the path he would naturally follow. About that point he saw Florentino Castro, who was walking beside the deceased, take an ordinary sheath knife out of the bosom of his blouse and hold it in his hand, with the blade resting lengthwise of his arm upon his wrist. This excited his suspicions anew, and instead of following his path, as he ordinarily would, and without challenging or ordering any halt upon the part of the natives, he obliqued to the right, went across the road between the storehouses, and walked along to the westward, along the margin of the road, within a few feet of the northerly storehouse.

The foregoing facts are completely established by the evidence, some upon the testimony of the defendant alone, and are found by the court. From this point and as to the actual shooting there is a conflict in the testimony. The defendant is accused in another complaint in this court of the assassination of Florentino Castro, the companion of Felix Villanueva, on the same occasion. That case is not now on trial, and the evidence and facts found concerning the acts and death of said Castro are received in this case only for the purpose of explaining and so far as they relate to the death of Villanueva.

The defendant elected to testify in his own defense, and his own evidence from the point above stated was to the following effect:

That as he obliqued to the right from the corner of the storehouses, leaving his accustomed path and going towards the northerly side of the road, the two natives obliqued to the left in a line to meet him, leaving their natural course to their right until they came within 25 or 30 feet of him; that Florentino then changed the position of the knife in his hand, and, bringing the blade to the front, crouched
127 forward and made a dash at him, followed by the deceased, Felix Villanueva; that in consequence of said action and motion he deemed it necessary in defense of his own safety to fire upon Florentino, and that he threw a shell into the barrel of his rifle and fired at Florentino at a distance of about 15 feet; that Florentino immediately fell, and Felix, his companion, turned and ran in the direction of the storehouse on the southerly side of the highway; that the defendant immediately threw another shell into the barrel of the rifle and fired upon Felix while he was near the wall of the southerly storehouse as he could get and in a crouching attitude; that Felix fell back against the wall of the storehouse; that at the moment of firing he shouted for the guard; that within 20 seconds or such a matter several persons arrived; that he remained standing

practically in the same position he was in at the time of firing, thought he might have moved a yard or such a matter; that Florentino and Felix both remained where they fell, and he estimated the distance to Felix at 20 to 25 feet beyond Florentino; that at the moment of firing no one was in sight; that he did not see any other natives at the time of firing; that the knife carried by Florentino fell about midway between himself and where Florentino fell; that he did not fire but two shots; that Felix lay at the point where there are certain holes in the corrugated-iron wall of the storehouse; that he did not know either of said natives, or of any reason for them to have any resentment or desire of revenge toward him, and he had none toward them, and that he did not see any weapon in the possession of Felix.

It is for this shooting that the defendant is upon trial and the above version of the shooting is that sworn to by the defendant himself.

The testimony of the Government varied in some essential particulars from that of the respondent himself. The Govern-
128 ment's evidence tended to show that the two natives were boatmen in the employee of the quartermaster's department on the dock at Buena Vista; that they, in company with others, had been waiting during the day, expecting the arrival of the transport "Liscum;" that it not being sighted, they started for their dinner at about 3 o'clock; that their way led them along the road in question between the storehouses and past the officer's quarters; that as they passed the coal pile, before named, which is situated at the end of the dock on the right-hand side of the highway, going easterly and about 80 yards from the scene of the shooting, Felix had his sheath knife, which he as boatman was accustomed to carry, in his hand and was trimming his finger nails with it; that the two walked quietly, without any demonstration against the guard or anyone, along the highway, until they met the sentry at a point somewhat westerly from the point where the bullet holes were found in the wall of the storehouse; that the sentry was approaching from the east and as they advanced he went to the northerly side of the highway, and when they were within 20 or 25 feet from the sentry he covered Felix with his gun, aiming at him; that Felix turned to the right and went obliquely away from the defendant to the side of the storehouse and stooped down and attempted to pass, whereupon the defendant fired upon him, without hitting him; that he immediately fired the second shot, which took effect in his left shoulder, causing a wound from which he died almost immediately; that thereupon Florentino, who had stood practically still in his tracks after the pointing of the gun at them, attempted to run and retrace his steps, and the sentry fired upon him and he fell in his tracks, mortally wounded.

They support this claim by the testimony of Ambrosio Obidilla and Marcario Olbe, two native employees of the quartermas-
ter's department, who testified to being eyewitnesses of the
129 facts before stated and testify that three shots were fired and that the position of Florentino's body was such that it was im-

posible for the bullet that killed him to have made the mark in the storehouse at the point where Felix was killed, which is confessedly a bullet mark and made at the time of the shooting in question.

The defendant claimed that the testimony of Ambrosio Obidalla and Macario Olbe was a pure fabrication; that they were not eyewitnesses of the affair. I am satisfied and find they were eyewitnesses, and at the time at a distance of about 70 to 80 yards from Florentino and Felix; that Florentino and Felix were employees of the quartermaster's department on the dock at Buena Vista and had been waiting there during the day, expecting the arrival of the transport "Liscum," and that it not being sighted, they had started for their dinner at the time mentioned; that their way was along the roadway in question and between the storehouses and past the officers' quarters; that as they passed the coal pile, before named, which is situated at the end of the dock on the right-hand side of the highway going easterly, in a position claimed by the Government, Felix had his sheath knife, which he carried as a boatman, in his hand and was trimming his finger nails with it; that the two witnesses, Ambrosio Obidalla and Macario Olbe, also native employees of the quartermaster's department, saw them as they passed by and followed them a little distance toward the storehouse and saw the shooting at a distance of about 70 or 80 yards; that Florentino and Felix walked along quietly until they came near the westerly corner of the southerly storehouse and along the path between the storehouses, until they observed the sentry obliquing to the right, apparently to avoid meeting them; that when they saw this motion they themselves bore a little to the left to pass near the sentry; that the knife was
130 then in the possession of Florentino (I am not able to tell at what point it was changed from the hands of Felix to Florentino, but I am convinced that it was observed by the defendant at about the time Florentino and Felix reached the corner of the storehouse, and that Florentino carried it in his hand from that point); that when they reached a distance of about 18 to 20 feet from defendant the defendant fired upon Florentino, the bullet striking about one inch below the ribs on the right side, passing diagonally through the body, emerging on the left of the spinal column an inch below the point of entrance; that Florentino at the moment had the knife in his hand and fell in his tracks, the knife falling near where his feet were and remaining in that position until after the arrival of the officer of the guard and other witnesses and until removed; that at the moment of firing Felix turned to the right and ran pretty nearly in the direction of the shot to the storehouse on the southerly side of the road and a distance of 35 or 40 feet from the defendant, and being unable to continue his flight, crouched down against the wall. The defendant, as quickly as possible after firing upon Florentino, threw another cartridge into the barrel of his gun and immediately fired on Felix, the ball striking him at the point of the left shoulder, passing diagonally through his body, coming out upon the right side between the 5th and 6th ribs, killing him prac-

tically instantly, although he lived a few seconds; that he fell against the storehouse and remained in the position in which he fell until the arrival of other witnesses. I am satisfied that only two shots were fired, and that they were fired under the foregoing circumstances. I am not satisfied that the natives, Florentino and Felix, made the rush, running toward the defendant with the knife advanced and in a crouching attitude, as described by him, but I do not deem it necessary to affirmatively find to the contrary in order to dispose of this case. I am inclined to believe that some demonstra-
131 tion was made with the knife, and account for it in my mind upon the ground that the natives had observed the trepidation and nervousness of the defendant and that he had left his path to avoid them, and they advanced in the manner in which they did and made whatever demonstration they did because they thought he was afraid of them and with a spirit of sport and to see what action he would take, rather than with any intention on their part to assault him or use the knife upon him. It is absolutely incredible to me that these two natives, armed only with the knife in question, should have committed such an assault as the defendant claims, especially in view of the fact that he apparently surpassed either of them in physical strength and was armed with a much superior weapon and was in easy call of the reserve guard, while they were alone, no other natives being in the vicinity, and had in their possession no other arm except the knife in question. The cost of their action, whatever it was, and of the defendant's nervousness and excited condition, is the life of two Filipinos, but I am unable to believe and I find that they had no further design upon the defendant than perhaps to increase his nervous condition by frightening him a little by their action.

The marks of the two bullet holes are in the wall of the storehouse, which is of corrugated iron, at the point where Felix was shot. They are situated about 20 inches above the ground and nearly upon a level, and are from 1 to 1½ inches from each other, and are the marks of the two shots which defendant fired, as above stated. The direction of the shots was diagonally across the road from the northerly side of the road, from a point about 40 feet distant from the holes in the wall. The line of fire would practically cover the place where the body of Florentino lay to the point where the body
132 of Felix lay from the point where the sentry stood at the time of shooting, and corroborates his statement as to the distance where Florentino was when he fired upon him; Florentino's body lay in nearly the middle of the road a little to the east of the bullet marks. Felix's body lay, as before stated, at the point where the bullet marks are, and the position of the sentry at the time of firing was somewhat east from the point where Florentino was shot.

Without attempting to discuss the defendant's justification for firing the first shot, I believe and find that the second shot, by which Felix was slain, was unjustifiable and unlawful, in consideration of

all the facts in the case. If an attack was made by Felix, it had been abandoned before he was shot. He had ran as far as possible in an opposite direction from the defendant. He had crouched by the side of the wall not in an belligerent position, but rather in one of supplication and submission. He was unarmed; his companion was down and there were no other companions of his or natives within sight of the sentry. The guard and most of the detachment and officers were within 50 to 75 yards from the sentry, to his own knowledge. The sentry was possessed with a loaded rifle, with which, if any new demonstration was made against him by Felix, he could have successfully defended himself. Felix, as before stated, was at a distance of about 40 feet from him, and shooting him under those circumstances was not necessary for the defendant's protection or for the protection of the property of the Government, or in discharge of defendant's duties, nor would such shooting, under the circumstances, appear necessary to a man of ordinary intelligence, firmness, and reason as a necessary defense of his life or safety.

He does not come within any of the circumstances which exempt him from criminal liability under the provisions of chapter 2 133 of article 8 of the Penal Code, then and now in force in these islands. There is no extenuating circumstances, except such as have already been stated in the foregoing statement of facts. I think, under the provisions of article 9, the extenuating circumstances mentioned in sec. 7, to a considerable extent, existed, and the defendant at the moment of firing the shots was in a state of great mental excitement, and that in firing the second shot he acted without consideration of the circumstances which have been related that insured his safety from injury by Felix; that he acted without premeditation—that is, without deliberate premeditation—and there is not any circumstance other than already stated to show that he acted with treachery.

Accordingly upon the foregoing facts, the defendant is by the court adjudged and declared guilty of an infraction of article 404 of said Penal Code, and of the crime of homicide, in killing the said Felix Villanueva, at the time and place and in the manner hereinbefore stated, and in view of the extenuating circumstances before remarked upon, he is sentenced by the court to imprisonment in such prison as the law directs, for the term of twelve years and one day, it being the minimum term of the minimum degree of reclusion temporal, which is the penalty for homicide, and to pay the costs of the prosecution, and to suffer all the other accessories of said sentence.

HENRY C. BATES,
Judge of the Court of the First Instance,
9th Judicial District.

ILOILO, *Dec. 11th, 1904.*

Thereafter on the 16th day of December, 1904, the following notice of appeal was duly served by the defendant, to wit:

United States of America, Philippine Islands. Court of the First Instance, Province of Iloilo.

UNITED STATES
vs.
HOMER E. GRAFTON.

NOTICE OF APPEAL.

134 The defendant above mentioned, Private Homer E. Grafton, Company G, 12th United States Regiment of Infantry, appeals to the Supreme Court of the Philippine Islands from the decision made in the above-entitled cause by his honor Judge Henry C. Bates, judge of the Court of First Instance, Ninth Judicial District, and filed at Iloilo December 11th, 1904.

CLARENCE S. NETTLES,
Capt. & Actg. Judge-Advocate, U. S. A.,
Attorney for the defendant.

DECEMBER 16th, 1904.

Received to-day, the 16th of December, 1904.

RUPERTO MONTINOLA,
Provincial Fiscal.

135 The assignment of errors contained in the judgment of the Court of First Instance for the Province of Iloilo, Philippine Islands, as presented to the Supreme Court of the Philippine Islands, was as follows:

UNITED STATES, APPELLEE,
vs.
HOMER E. GRAFTON, DEFENDANT-APPELLANT.

ASSIGNMENT OF ERROR.

I. The court erred in overruling the demurrer and denial of jurisdiction by the defendant, for that:

(a) The Court of First Instance has no jurisdiction over offenses committed by officers or enlisted men of the United States Army within the limits of a military reservation of the United States.

(b) The Court of First Instance is without jurisdiction to try a soldier of the United States for an act done in the performance of his military duty imposed under the Constitution and laws of the United States.

(c) The defendant was entitled, under the Constitution of the United States, to trial by a jury of his peers.

(d) The indictment charging the defendant with assassination was not found or presented by a grand jury, as provided for by article 5 of the amendment to the Constitution of the United States.

II. The court erred in overruling the plea in bar of defendant for that, having been tried and acquitted of the identical homicide by a court of competent jurisdiction, the defendant could not be legally a second time placed in jeopardy of punishment for the same offense.

III. The court erred in finding:

(a) "I am satisfied upon all the evidence that these suspicions and fears were imaginary, and that the evidence of them, upon which he acted and formed his conclusions, were not sufficient to justify the conclusions and beliefs that he in fact entertained; that the appearances which he observed were magnified in his own apprehension, and were only such as are common and natural in the locality on that day of the week, it being Sunday; that the alleged suspicious
136 circumstances and appearances were not sufficient to cause apprehension of any danger in the mind of a prudent and reasonable man of ordinary firmness and observation, acting reasonably and prudently, of any unusual danger, or to cause apprehension of any attempted attack upon the guard, or attempted injury to the detachment, or property in question in this case."

(b) That the natives, Ambrosio Obidalla and Macario Olbe, were eyewitnesses to the homicide.

(c) That the two deceased natives "had no further design upon the defendant than perhaps to increase his nervous condition by frightening him a little by their action."

(d) "That the second shot, by which Felix was slain, was unjustifiable and unlawful in consideration of all the facts of the case."

(e) That the shooting, under the circumstances, was not necessary for the defendant's protection of the property of the Government or in the discharge of defendant's duties, nor would such shooting, under the circumstances, appear necessary to a man of ordinary intelligence, firmness, and reason as a necessary defence of his life or safety.

(f) The defendant "does not come within any of the circumstances which exempt him from criminal liability under the provisions of chapter 2, art. 3, of the Penal Code."

The court erred in adjudging and declaring the defendant guilty of an infraction of art. 404 of the Penal Code, and of the crime of homicide, in killing Felix Villanueva, and imposing the sentence, "imprisonment in such prison as the law directs for the term of twelve years and one day, and to pay the cost of the prosecution, and to suffer all the other accessories of said sentence."

CLARENCE S. NETTLES,
Captain and Acting Judge-Advocate, U. S. Army,
Attorney for Defendant-Appellant.

Therefore, to wit, on January 24, 1905, the cause was duly transmitted to the Supreme Court of the Philippine Islands, as per the following letter of transmittal:

137 THE COURT OF FIRST INSTANCE,
NINTH JUDICIAL DISTRICT,
Iloilo, January 24, 1905.

The Clerk of the Supreme Court, Philippine Islands, Manila, P. I.

SIR: I have the honor to transmit the attached case No. 248 of the year 1904 against Homer E. Grafton, for murder and the sentence dictated in said case by virtue of the appeal interposed by defendant's attorney from the judgment rendered in the said cause.

Very respectfully,

LOUIS CORTES,
Clerk of the Court of First Instance of Iloilo.

Filed with the clerk of the Supreme Court January 26th, 1905.

Argued August 10th, 1905. Reargued January 25, 1906.

Decision was rendered April 3rd, 1906, and final judgment entered April 14, 1906.

The decision of the majority of the court and the dissenting opinion of the minority are as follows:

United States of America. In the supreme court of the Philippine Islands.

THE UNITED STATES
vs.
HOMER E. GRAFTON. } No. 2400.

TRACEY, J.

138 The defendant charged with the crime of assassination was convicted of homicide and sentenced to a term of imprisonment of twelve years and one day. He was a private in the United States Army, and when on guard at a military reservation at Camp Jossman, Guimiras, shot and killed two Filipinos, Florentino Castro and Felix Villanueva. For this offence he was tried by court-martial and acquitted, but thereafter was prosecuted by the people in the present action for the death of Felix Villanueva.

The first inquiry is, "Was the shooting justified?" It occurred on Sunday afternoon, July 24th, 1904, between two and three o'clock; the deceased were both employed as boatmen in the U. S. quartermaster's department and were at the time in a road used as a public thoroughfare which the sentry was patrolling.

The defendant's testimony is as follows:

"I was at the east end of my post about starting to the west post. I arrived at about half way between Lieutenant Harrell's quarters and the storehouse. Two natives came on my post about half way between the storehouse and the coal pile on the left. They had

climbed over the stone wall and passed over my post. They advanced directly towards my post. When I arrived at the corner of the storehouse they were about the corner of the same storehouse at the other end. Just as I started to cross those stones, a native reached in his bosom and pulled out a knife and immediately he changed the handle and concealed the knife under his arm from my view. Upon seeing that, I looked back toward the building on the right on the road coming towards the dock and upon getting near the building they had arrived at a place to my left. Upon gaining this position, the native turned the knife with the point towards me and made a rush at me. At the same time the other native followed close to him. At the time he did this I brought my piece to my shoulder, threw a cartridge in the magazine and fired at him. The other native jumped back towards the quartermaster building. I loaded
139 my rifle and fired at him. Immediately after firing at the second native I hollowed for the guard. As soon as I hollowed for the guard I looked in the direction the guard was coming from."

On being interrogated by his counsel, he further testified that as the native approached him he had left his path immediately before the shooting and walked from fifteen to eighteen feet away towards the southerly storehouse.

Upon cross-examination he testified, putting his testimony into narrative form:

"Florentino was running when I shot him and was distant from me when I fired about four paces; he dropped practically right where I shot him; the other man followed right behind him on the run; I don't know exactly where he was when I shot him, but the distance was about [indicating about 35 feet]. He was not coming towards me when I fired; he jumped back towards the quartermaster building before I fired; he had no weapon that I saw; he was crouching; there was an interval between the two shots, time to load my magazine; there had to be a little space of time to work the magazine; first he started running towards me, a little to the right and to the rear of the other man who was rushing upon me with a knife; he changed his attitude and started the other way when I fired the first shot; I did not see any weapon in his hand or on his person."

He further testified that on looking around he saw no other native than the two upon whom he fired; that he shot them because they were trying to do him injury; that he considered his life in danger; that he fired but two shots, and that neither of the natives moved from the spot where they fell prior to the arrival of Lieutenant Harrell, who came almost immediately after the shooting.

Lieutenant Harrell, the commanding officer of the defendant, who saw the bodies where they fell, measured the distance and made a memorandum about forty-five minutes after the shooting,
140 swore that the body of Florentino Castro lay ten and a half feet from Private Grafton, and that of Felix Villanueva thirty feet from Florentino; that the distance from the defendant to

the wall where Felix Villanueva lay was forty-five feet, and that the centers of the two bullet holes in the wall above the body of Felix Villanueva were about three and a half inches apart.

On several points the defendant's testimony was disputed by Government witnesses, chiefly by two Filipino laborers employed in the quartermaster department at Guimiras, who swore that they saw the occurrence from the road near the coal pile; that the knife was carried by Felix, not by Florentino, and that he was trimming his nails with it; that he left the road only after the soldier pointed his rifle at him; that three shots were fired, two of them at Felix, who dropped first. The knife which is before the court is of the kind commonly carried by boatmen and is ten inches long, including the handle.

This testimony was contradicted by the position of the knife, which lay between the sentry and Florentino and by the many military witnesses, who united in saying that they heard only two shots. As to the number of shots it is supported not only by a third witness, but also by the singular fact that the two bullet holes in the storehouse wall near enough together to be covered by the palm of a hand, were both immediately above the body of Felix, a result scarcely conceivable had one of them first passed through the body of Florentino, where he is reported to have stood. As to the knife, they may have been in error in regard to the person carrying it, or it may have changed hands (as inferred by the learned trial justice) while the men came along the road. In other respects their testimony is not uncorroborated, and if given full credence would lead to the conviction of the defendant. We shall, however,
141 for the purpose of this judgment, accept the defendant's version of the facts.

A soldier guarding the property of the Government and the lives of his comrades can not be held to a too rigid accountability if he acts in the honest exercise of his judgment and with reasonable regard to human life. The defendant was proved to be a man of good character, of intelligence, and of sound judgment. This shooting occurred in the time of peace; there was no insurrection or disorder; the day was Sunday; the movements of the natives, not unusual on that day of the week, had aroused the suspicion of the defendant, who, being a newcomer, was unfamiliar with them, and he reported them to his superior officer. This had worked upon his fears and nerves. He had sometime before seen the bodies of some soldiers who had been surprised and killed, and the remembrance of that scene helped to unfit him to judge calmly the events before him. In these circumstances his leaving the path in order to avoid these natives was an act of prudence, and when the first native, Florentino Castro, holding a knife in his hand, approached the sentry, it was allowable for him to anticipate an attack and to defend himself as he did. This may be conceded, even though we do not accept the defendant's statement that the native was making a rush upon him pointing the knife at him, particulars in which he is apparently con-

tradicted by the probabilities of the case, as well as by the native witnesses. In any case, Florentino must have known that in going out of his way to approach an armed sentry on duty, whether in threat or in sport, he was taking his risk, and the sentry can not be punished for acting upon his own construction of that movement.

It is not, however, for the killing of this native that he was tried, but for that of Felix Villanueva, who was following his com-
142 rade. The defendant's own testimony makes it plain that the interval between the shots was long enough not only to enable him to throw a new cartridge from the magazine of his rifle into the barrel and to suffer Felix to reverse his career and run back a distance of about twenty-five feet and crouch down, but also to permit the defendant to observe these things.

In our judgment the observation by the defendant that the native, instead of advancing upon him, was fleeing from him and was protecting himself in a crouching attitude against the wall, was sufficient to apprize him that there was no danger and to deprive him of any justification for the shooting. The sacredness of Government property or of the life of the soldier is not greater than that of the life of a citizen, and a sentry with a loaded rifle in his hand, in the full possession of his senses, is bound to use reasonable judgment and is accountable for human life taken by him without the justification of immediate defence of himself or of his charge. The great trust conferred upon him is the measure of his high responsibility, and he may not act without forethought in the heat of strife. This soldier, observing that Felix had fled from him and had reached a point where flight was no longer possible, should have been conscious that he was in no bodily danger and he should not have fired the second shot.

The defendant sets up several defences upon the law, the first being the defence of twice in jeopardy. Immediately after the shooting and before the death of Florentino Castro, the civil justice, when seeking to take his dying statement, was warned by the officer in command "to keep out of it;" that he was on a military reservation and he would have to leave the things to the officer, and if he did not he would be put off or into the guardhouse. Later on, however, before holding the court-martial, the department commander offered to submit the case to the Court of First Instance of the islands. It does not appear what action the judge of that court took thereupon.
143 The court-martial proceeded and was terminated by the acquittal of the accused, and that acquittal is pleaded in bar.

Applying to these islands the principle of the 5th amendment to the Constitution of the United States Congress enacted on July 1st, 1902, "The Philippine bill," which provides:

"And no person for the same offence shall twice be put in jeopardy of punishment." (Section 5.)

In the Collie case, December 12, 1903, and the Tubig case, January 24, 1904, this court has decided that trial by United States Army court-martial in time of war or insurrection is a bar to an after

prosecution by this Government for the same offence, holding that the qualification of the doctrine of jeopardy found in the dual sovereignty of the several States and of the General Government has no place here, inasmuch as both governments, civil and military, derive their being and powers from the one sovereign, the United States. In these decisions, however, the doctrine is expressly limited to courts-martial held in time of war. Does it apply to those held in time of peace? The matter is governed by the 62nd Article of War, which reads as follows:

"ARTICLE 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental garrison, or field officers' court-martial, according to the nature and degree of the offence, and punished at the discretion of such court."

It differs from article 58, applying to cases of war, which expressly punishes murder, and under which the jurisdiction of these tribunals has been held to be exclusive. The construction of the 62nd article has not been settled. It has been contended on the one hand
that the constitutional provision in aid of liberty and for the
144 security of the citizen should be given the broadest construction, and that no prosecution should be twice had by the same sovereign for the same offence; that, having a right to select the tribunal, his selection should be final, and he should abide by the result, and it is argued that this fundamental principle will be nullified if cumulative proceedings are allowed. In favor of this construction stand the provisions of the 59th Article of War directing that an officer or soldier accused of a crime punishable by the laws of the land shall be turned over upon application to a civil magistrate.

It has been said by a text writer on the authority of cases which he cites:

"If the court in which the defendant was formerly prosecuted was legally constituted and had jurisdiction it makes no difference what the court was. The former jeopardy will bar a subsequent prosecution by the same sovereign in any tribunal whatever.

"When two separate courts of the same sovereign have concurrent jurisdiction of the same offence, the one which first rightfully assumes jurisdiction acquires control to the exclusion of the other." (Clark's Criminal Procedure, 388.)

The circumstance that the civil trial was for murder, a crime of which courts-martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the defense on this theory. The identity of the offences is determined, not by their grade, but by their nature. One crime may be a constituent part of the other. The criterion is, Does the result of the first prosecution negative the facts charged in the second? It is

apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of jeopardy.

On the other hand, the great preponderance of text writers of judicial dicta and the reported opinions of Attorneys-General of the United States concur in regarding the same criminal act in its relation to the civil law and to the military law as constituting two distinct offences, the one being contrary to a criminal statute, and the other to military regulations, and therefore a mere breach of discipline. It is urged that this construction is required, both in the interest of civil law and military discipline, neither of which necessarily interferes with the other. In this view, the military sentence is not the punishment of a civil crime, but only the enforcement of military order.

In the case of United States v. Clark (31 Federal Reporter, 710), an escaping military prisoner, who was a soldier, was shot upon a military reservation in a time of peace. The military court of inquiry had acquitted the prisoner of blame. Judge Brown, presiding at the circuit, directed the discharge of the prisoner on the merits, but in reaching his conclusion, refusing to be bound by the holding of the military court, said:

"If the civil courts have jurisdiction of murder notwithstanding the concurrent jurisdiction by court-martial of military offences, it follows logically that the proceedings in one can not be pleaded as a bar to proceedings in the other, and if the finding of such court should conflict with the well-recognized principle of civil law, I should be compelled to disregard it."

In Cashiels case, Federal cases, No. 14744, the district judge appears to have been of the same opinion.

In Ex parte Mason (105 U. S., 699), the Supreme Court, considering the jurisdiction of a court-martial to try a soldier who when on duty had assaulted a citizen prisoner, waived this question, saying:

"Whether after trial by court-martial he can again be tried in the civil courts is a question we need not now consider."

Thus the question is left open by that tribunal. We favor
146 the construction long acted upon by both military and civil courts, that conviction of a civil crime does not bar military punishment for the same act in its character as a breach of discipline, that the rule applies conversely, and that trial in neither jurisdiction is a bar to proceedings in the other. The defence of double jeopardy is therefore overruled.

The defendant sets up as additional defences that the insular courts had no jurisdiction, for the reason that the offence was committed upon a military reservation of the United States; that having been committed by a soldier of the United States in the performance of his duty, it was not cognizable by the said courts, which can not be regarded as "United States courts;" and that the right of trial by

jury, while denied to American citizens voluntarily in these islands, is preserved to soldiers coming here under orders. We do not consider the discussion of these points necessary, for the reason that they appear to be judicially settled.

The sentence of the lower court is hereby affirmed.

JAMES F. TRACEY.

We concur:

C. S. ARELLANO.
FLORENTINO TORRES.
VICTORINO MAPA.

147 WILLARD, J.

The sentry voluntarily left the path beside the road to avoid a meeting with the two men, Castro and Villanueva. There was no occasion for their leaving the path and advancing towards him. That Castro did this with an open knife in his hand is conclusively proved by the fact that the knife and his body were found in the middle of the road. As to him, the case is brought fully within the provisions of article 8, paragraph 4, of the Penal Code, and the sentry is relieved from responsibility for his death.

That Villanueva participated in the wrongful aggression must, I think, be accepted as true. As to him, two of the requisites of article 8, paragraph 4, are proved, viz, an unlawful aggression and the absence of previous provocation. The question is whether the third requisite was also proved, viz, reasonable necessity for the means employed to repel the aggression.

The time elapsing between the firing of the first and second shot does not appear, but it seems to me from the testimony of Grafton quoted in the opinion that it could not in any event have exceeded five seconds. Looking at the case now, after a lapse of nearly two years, we can see that the killing of Villanueva was not necessary, and that Grafton committed an error of judgment in firing the second shot; but the case must be determined not by the way it now presents itself to us, but as it presented itself to Grafton, upon whom an unlawful aggression was being made by the two men, acting together. In repelling that aggression he performed two acts within five seconds of each other. Relieved from the responsibility for the first act, to hold him responsible for the second is to require of him the same serenity of mind in the excitement and stress of action as in the repose of consultation and reflection. In the case of the
148 United States v. Juan Salandanan (1 Phil. Rep., 478), this court said:

"We can not require a man who finds himself so forcibly and persistently attacked as was the accused to retain the presence of mind necessary to pick and choose and employ some other less violent means, more especially when we remember the natural rapidity with which the defense must necessarily be made if it is to produce the effect of repelling the aggressor."

See also the case of the United States v. Bernardo Patala (2 Phil. Rep., 752).

I think that the judgment should be reversed and the defendant acquitted.

CHARLES A. WILLARD.

We concur:

E. FINLEY JOHNSON.

A. C. CARSON.

149 Thereafter, on April 17, 1906, the following petition for writ of error and assignment of errors were filed by the plaintiff in error, to wit:

United States of America, Philippine Islands. In the Supreme Court of the Philippine Islands.

No. 2400.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } At law.

PETITION FOR WRIT OF ERROR.

And now comes Homer E. Grafton, plaintiff herein, and says that on or about the 14th day of April, 1906, the Supreme Court of the Philippine Islands entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

CLARENCE S. NETTLES,
Captain and Acting Judge-Advocate, United States Army,
Attorney for the Plaintiff.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 17th day of April, 1906, 11.30 a. m.

J. E. BLANCO, *Clerk.*

150 United States of America, Philippine Islands. In the Supreme Court of the Philippine Islands.

No. 2400.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } At law.

The defendant in this action, in connection with his petition for a writ of error, makes the following assignments of error, which he avers occurred upon the trial of this case, to wit:

I.

The court erred in holding that the defendant had not been twice put in jeopardy of punishment for the same offense.

II.

The court erred in holding that the defendant, through an enlisted man of the Army of the United States, and being at the time of the alleged offense in the Philippine Islands by virtue of military orders, could be tried by the civil courts of the Philippine Islands without a jury, notwithstanding the guaranties provided by section 2, Article III, and Articles V and VI of the amendments to the Constitution of the United States of America.

151 III.

The court erred in holding that the civil courts of the Philippine Islands have jurisdiction to try a soldier of the United States for an act done in the performance of military duty imposed under the Constitution and laws of the United States.

IV.

The court erred in holding that the act of the defendant, committed without malice and in the honest and reasonable belief that he was performing his duty, constituted an infraction of article 404 of the Penal Code of the Philippine Islands, and the crime of homicide.

CLARENCE S. NETTLES,
Captain, Acting Judge-Advocate,
United States Army,
Attorney for Plaintiff in Error.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 17th day of April, 1906, 11:30 a. m.

J. E. BLANCO, *Clerk.*

Thereafter, on the 17th day of April, 1906, the following orders were made, to wit:

No. 2400.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Supreme Court of the Philippine Islands, greeting:

152 Because in the records and proceedings, and also in the rendition of the judgment of a plea which is now depending in said Supreme Court of the Philippine Islands, before you, between the United States of America, plaintiff, and Homer E. Grafton, defendant, a manifest error has happened, to the great damage of the said Homer E. Grafton, as by his complaint appears. We, being willing that the error, if any has been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 15th day of August next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the seventeenth day of April, in the year of our Lord one thousand nine hundred and six, and of the independence of the United States of America one hundred and twenty-nine.

Allowed by:

JAMES F. TRACEY,
J. S. C., P. I.

[SEAL, S. C.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

153 United States of America, Philippine Islands. In the Supreme Court of the Philippine Islands.

No. 2400.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } At law.

ORDER.

This seventeenth day of April, 1906, comes the plaintiff in error by his attorney and files herein and presents to the court his peti-

tion, praying for the allowance of a writ of error, and an assignment of errors intended to be used by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error, which shall act as a supersedeas.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

154 No. 2400.

THE UNITED STATES OF AMERICA, *ss:*

To Lebbeus R. Wilfley, esquire, Attorney-General of the Philippine Islands, greeting:

Your are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the 15th day of August, 1906, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Philippine Islands, wherein Homer E. Grafton is plaintiff and the United States is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Manila, Philippine Islands, in the year of our Lord one thousand nine hundred and six, the seventeenth day of April.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

Receipt of the foregoing citation is hereby acknowledged.

L. R. WILFLEY,
Attorney-General for the Philippine Islands.

Manila, P. I., April 17th, 1906.

155 United States of America. In the Supreme Court of the Philippine Islands.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
against
THE UNITED STATES, DEFENDANT IN ERROR. } No. 2400.

I, H. D. McGeorge, deputy clerk of the Supreme Court of the Philippine Islands, in charge, do hereby certify that the foregoing is a true and complete transcript of the records and proceedings had

in the above-entitled cause, and pursuant to an order of the honorable James F. Tracey, associate justice of this court, entered the seventeenth day of April, 1906, allowing a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands, the same is transmitted herewith.

[SEAL.] H. D. McGEORGE,
Deputy Clerk Supreme Court P. I., In Charge.

(Indorsement on cover:) File No. 20323. Philippine Islands Supreme Court. Term No. 358. Homer E. Grafton, plaintiff in error, vs. The United States. Filed August 3, 1906. File No. 20323.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

HOMER E. GRAFTON,
Plaintiff in Error,
VS.
THE UNITED STATES,
Defendant in Error.

NO. 358

BRIEF OF PLAINTIFF IN ERROR.

CLARENCE S. NETTLES,
JOHN H. ATWOOD,
F. D. McKENNEY,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

HOMER E. GRAFTON,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.
NO. 358.

BRIEF OF PLAINTIFF IN ERROR.

The plaintiff in error is a citizen of the United States and while within its confines, he enlisted as a soldier in the army thereof. He was charged in the court of First Instance for the Province of Iloilo, Island of Panay, Philippine Islands, with the crime of assassination. The alleged offense was committed within a military reservation, on the Island of Guimeras, in the Philippine Archipelago, on the 24th day of July, 1904. At the time of the commission of the acts complained of, the soldier was in the performance of his duty as a sentinel, duly posted by proper military authority, guarding military stores and property of the United States.

During the day the plaintiff in error observed various movements on the part of natives about the reservation, which seemed to him suspicious and which excited his apprehension; his state of mind is manifested by the testimony, that just prior to the occurrence of the fatal incident he reported these matters to the Corporal of the Guard, requesting the Corporal to report the same to the commanding officer. Shortly after making this report, the soldier observed at about eighty yards distant two natives approaching him along his beat, which was upon the military road passing through the reservation. As these natives approached, he observed one of them draw a large knife or bolo from his breast and conceal it behind his forearm.

Apprehending attack, the soldier continued walking his post but crossed over to the opposite side of the road to allow the natives to pass in peace and at a distance, if such was their intent. When within about twenty-five or thirty feet of the sentinel, however, the natives rushed upon him, the leader having drawn the bolo for attack. The soldier promptly fired two successive shots, loading from his magazine, first upon the native bearing the bolo, and then upon his companion. The two shots were fired within less than five seconds, both were effective and both natives died of the wounds so received.

The evidence shows that plaintiff in error is an experienced soldier, having served with our Army in the China campaign before the walls of

Pekin, and in many parts of the Philippine Islands —that he was regarded as a cool and steady man of most excellent character.

The killing of the second native, Felix Villanueva, constitutes the offense charged.

The civil authorities at Iloilo, Panay, were promptly notified of the occurrence by the commanding general of the military department (Visayas) in which the alleged offense was committed, and trial of the case was proffered to the Court of First Instance for the Ninth Judicial District. Civil jurisdiction, however, being declined, a general court-martial was convened in due course by the proper military authority, and the plaintiff in error was brought to trial before that tribunal under the sixty-second Article of War, upon two specifications alleging respectively manslaughter in the case of each native killed.

By that court the plaintiff in error was acquitted and upon review the acquittal was approved by proper military authority and so published in appropriate orders issued from Headquarters Department of the Visayas, Philippine Islands.

Subsequently the civil authorities at Iloilo, being dissatisfied with the result of the trial by the military tribunal, charged the plaintiff in error with the assassination of Felix Villanueva, the second native shot, and demanded that he should be delivered by the military authorities for trial.

This demand was acceded to. Upon being brought before the Court of First Instance, the plaintiff in error demurred to the indictment and denied the jurisdiction of the court, upon the grounds, among others:

a. *Because the act constituting the alleged offense was done by a soldier of the United States in performance of his duty under the laws of the United States.*

b. *Because he was entitled to his constitutional privilege of trial by jury.*

c. *Because he could not legally be brought to trial by any court, other than a military tribunal, except on an indictment found and presented by a grand jury.*

The demurrer and denial were overruled. The plaintiff in error then pleaded specially in bar of trial the record of his previous trial and acquittal of the same offense by a general court-martial, which plea was likewise overruled.

Plaintiff in error then pleaded not guilty to the merits, and was found guilty of homicide and sentenced to "imprisonment in such prison as the law directs for the term of twelve years and one day, and to pay the cost of the prosecution and to suffer all the other accessories of said sentence."

From this finding and sentence of the Court of First Instance of the Ninth Judicial District

of the Philippine Islands, plaintiff in error appealed to the Supreme Court of the Philippine Islands, assigning error on the part of the Court of First Instance in overruling his demurrer and plea of *autrefois acquit* and in the finding of guilty upon the merits of the case.

This appeal was argued in the Supreme Court of the Philippine Islands on the tenth of August, 1905, re-argued January 25, 1906, and a decision affirming the sentence of the lower court was rendered by a divided court on April 3, 1906.

ASSIGNMENT OF ERROR.

Now comes the plaintiff in error and makes the following assignments of error, which he avers occurred upon the trial of the case, to-wit:

I.

The court erred in holding that the plaintiff in error had not been twice put in jeopardy of punishment for the same offense.

II.

The court erred in holding that the plaintiff in error, though an enlisted man of the Army of the United States, and being at the time of the alleged offense in the Philippine Islands by virtue of military orders, could be tried by the civil courts of the Philippine Islands without a jury, notwithstanding the guarantees provided by Section 2, Article III of the Constitution of the United States

of America, and Article V and VI of the Amendments thereto.

III.

The court erred in holding that the civil courts of the Philippine Islands have jurisdiction to try a soldier of the United States for an act done in the performance of military duty imposed under the Constitution and laws of the United States.

IV.

The court erred in holding that the act of the plaintiff in error, committed without malice and in the honest and reasonable belief that he was performing his duty, constituted an infraction of Article 404 of the Penal Code of the Philippine Islands, and the crime of homicide.

I.

THE PLAINTIFF IN ERROR, HAVING BEEN TRIED AND ACQUITTED OF THE ALLEGED HOMICIDE BY A LAWFULLY CONSTITUTED COURT, HAVING JURISDICTION OF HIS PERSON AND THE SUBJECT MATTER OF THE OFFENSE, HIS SECOND TRIAL UNLAWFULLY PUT HIM IN JEOPARDY OF PUNISHMENT A SECOND TIME FOR THE SAME OFFENSE, IN DIRECT VIOLATION OF THE 5TH ARTICLE OF THE AMENDMENTS TO THE CONSTITUTION, AND SECTION 5 OF THE ACT OF CONGRESS OF JULY 1ST, 1902, (32 STAT. AT L. 691, CHAP. 1369.)

Upon being brought to the bar for arraignment in the court below, the plaintiff in error submitted the following plea in bar:

> The accused, as a special plea in bar of these proceedings, submits herewith a duly certified copy of the judgment of a general court-martial, duly convened by Special Orders, No. 152, dated Headquarters Department of the Visayas, Iloilo, Panay, Philippine Islands, showing that he has heretofore been tried for and acquitted of the identical offense alleged in the indictment, as, by the record thereof, more fully and at large appears, which said judgment still remains in force and effect, and not in the least reversed or made void.

The indictment, or charge, upon which the defendant was arraigned, tried and acquitted by the general court-martial was as follows:

> *Charge*:—Violation of the 62d Article of War.

Specification 1.—In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully and feloniously kill Florentino Castro, a Filipino, by shooting him with a United States Magazine rifle, caliber 30.

This at Buenavista Landing, Guimeras, P. I., July 24th, 1904.

Specification 2.—In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully and feloniously, kill Felix Villanueva, a Filipino, by shooting him with a United States Magazine rifle, caliber 30.

This at Buenavista Landing, Guimeras, P. I., July 24th, 1904.

Upon the judgment of acquittal, the following order was made by the reviewing authority, the Commanding General, Department of Visayas:

HEADQUARTERS DEPARTMENT OF THE VISAYAS.

Iloilo, Panay, P. I., August 25th, 1904.

Special Orders, No. 167.

EXTRACT

* * * *

4. Private Homer E. Grafton, Company G, 12th U. S. Infantry, having been tried by a general court-martial convened at Camp Jossman, Guimeras, P. I., and found not guilty of manslaughter in violation of the 62d Article of War, was acquitted.

> In the foregoing case, the acquittal is approved. Private Grafton will be released from confinement and restored to duty.
>
> By Command of Brigadier General Carter:
>
> D. A. FREDERICK,
> *Major, Assistant Adjutant General,*
> *Adjutant General.*

The plaintiff in error thus having been tried and acquitted of the homicide of Felix Villanueva by a court of competent jurisdiction, it is submitted that he was protected, both by the Constitution of the United States and the organic law of the Philippine Islands, from being a second time placed in jeopardy of punishment for the same offense.

Our courts have always guarded, with jealous care, the constitutional right of accused persons, not to be twice placed in jeopardy for the same offense. As was said by Mr. Justice Miller in *Ex Parte* Lange, 18 Wallace, 205:

> There is no more sacred duty of the court, than in a case properly before it, to maintain unimpaired those securities for the personal right of the individuals which have received for ages the sanction of the jurist and the statesman; and in such case no narrow or illiberal construction should be given the words of the fundamental law in which they are embodied.

By Article V of the Amendments to the Constitution of the United States, it is provided, *

* * "nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb."

The reservation of this constitutional right in the Act of Congress of July 1st, 1902, the organic law of the Islands is still stronger.

> Section 5. * * No person shall be held to answer for a criminal offense without due process of law; and no person for the same offense, shall be twice put in jeopardy of punishment.

Bishop, in his work on Criminal Law, Vol. 1, Sec. 979, says:

> One who, in a judicial tribunal, has been convicted, acquitted, or put in what the law terms jeopardy in respect to a real or supposed crime, can not be further or again pursued for it, except by some step in the proceeding he waived his right to rely on this immunity.

This precious right our forefathers brought with them to America from English shores, and their descendents have again transplanted it in those distant islands, where let us trust it will be nourished and fostered, and not permitted to wither and perish. So steadfastly has this right been maintained in the adjudicated cases, that it seems strange that it should again be brought in question. It would seem that it should be sufficient in this case to cite the recent decision of the Supreme Court of the United States in the Kepner case. 195 U. S. 100; 49 L. Ed. 114.

In speaking of the attempt on the part of the representatives of the government to give in that case to the words used in the organic law of those Islands, any other than that plain meaning which has always been given them by the courts, and which even the wayfaring man may understand, though he be not learned in the law, Mr. Justice Day says:

> How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudications in the courts of this country, and the maintenance of which has been ever deemed essential to our government, could be used by congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken? It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision is presumed to be used in that sense by the legislative body.
>
> (The Abbotsford, 92 U. S. 440.) * * * The learned justice continued, going to the merits of the case, that the common law "Protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction has acquitted the accused of the offense." The rule is thus stated by Hawkins, Pleas of the Crown, quoted by Mr. Justice Story in *U. S. vs. Gilbert* (2nd Sumner, 39); "The plea (says he) of *autrefois*

acquit is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offense more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal free from error and well commenced before any court, which hath jurisdiction of the cause, he may, by the common law, in all cases, plead such an acquittal in bar of any subsequent indictment or appeal for the same crime. In this court it was said by Mr. Justice Miller, *Ex Parte* Lange, (18 Wallace, 163):

The common law not only prohibited a second punishment for the same offense, but went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted. * * * It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority as well as decision of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before tribunal properly organized and competent to try him, certainly so, after acquittal." (*Coleman vs. Tennessee*, 97 U. S. 509.)

Undoubtedly in those jurisdictions where a trial of one accused of crime can only be put to a jury and a verdict of

> acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, it is obvious where one has been tried before a competent tribunal having jurisdiction, he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict.
>
> (*People vs. Minor*, 144 Ill. 308; *State vs. Bowen*, 45 Minn. 145; *State vs. Lange*, 96 Tennessee, 668.

In the case of *U. S. vs. Colley*, No. 1303, Decisions of the Supreme Court of the Philippine Islands, the question involved in this case has been ably presented. In that case the accused had been duly tried and convicted by a general court-martial, having jurisdiction of the cause. It having been impossible to enforce the death sentence imposed by the military court by reason of the transition of military authority, the defendant was duly indicted in the civil courts for the same offense and brought to trial. The court in a very able decision held as follows:

> If the tribunal has authority either concurrently with another or exclusive, whether it is an inferior one as a justice's court, a court-martial, or a court of a municipal corporation, or is a superior one—a conviction or acquittal in it will be a bar to a subsequent proceeding in whatever court undertaken.

(*I Bishop's Criminal Law*, Sec. 1029; *Commonwealth vs. Roby*, 12 Pick. Mass. 496.)

The acquittal of the accused by a court-martial is a bar to subsequent indictment in courts of common law for the same offense, the tribunal acquitting being competent to acquit.

(*Wilkes vs. Dinsman*, 7 How. U. S. 123.)

There are, however, numerous decisions of Federal and State courts holding that by the same act, a person may commit two crimes, may offend at the same time two sovereignties—that of the United States and that of the State in which the offense is committed. From this doctrine the conclusion was reached that therefore there could be two trials of the accused for the same act, one in the courts of the United States, and the other in the State tribunal also, and as a consequence two punishments.

This doctrine has been applied in such offenses as passing counterfeit money, harboring fugitives, illegal sale of liquor, etc. (*State vs. Rankin*, 4 Golden Tenn., 410; *Fox vs. Ohio*, 5 How. U. S., 410; *Baron vs. Mayor*, 7 Peters U. S. 243; *Moore vs. People of Ill.* 14 How. U. S. 13.)

Conceding this to be an exception to the general rule that an offender shall not be tried twice for the same offense

against his will, it is not applicable in this Colley case, and for the reason that there is no dual sovereignty in these Islands; and there is only one to be offended—The United States—for which and in the name of which the Commissioners in the Philippine Islands as well as courts-martial act.

At the time of the shooting in question, the Commission enacted laws "By authority of the President of the United States."

So here, there is but one offense, that against the United States, and when that Government chooses the tribunal in which to try an offender, when the trial takes place in that tribunal and when the accused is convicted and sentenced, he cannot again be put in jeopardy in another court of the same sovereign.

It follows that the defendant having been once in jeopardy cannot be tried again for the offense of which he was formerly convicted.

The present Supreme Court of the Islands endeavors to differentiate between that case and this, upon the ground that the former occurred in time of war and the latter in time of peace. In this attempted differentiation the crucial point of the case is lost sight of—the jurisdiction of the Court. In the former case the jurisdiction of the military court was exclusive, while concurrent in the latter.

This doctrine is cited with approval in a note to Kent's Commentaries, Vol. I, page 341.

> If they (the Civil Courts) had (jurisdiction), an acquittal by a court-martial would be a bar to any criminal proceedings in any other court.

And in the case of *Wilkes vs. Dinsman*, 7 Howard, 123, which arose upon an action of trespass against Commodore Wilkes for an alleged assault upon a marine, and in which the copy of the record of a general court-martial by which the defendant had been acquitted of the same offense was offered in evidence, and rejected by the civil court, it was said by Mr. Justice Woodbury on the appeal to the United States Supreme Court, "we think that such proceedings were not conclusive on the plaintiff here, *though a bar to subsequent indictment in the courts of common law for the same offense.*"

The case relied on in support of the contrary view of this question is that of the *United States vs. Cashiel*, 25 Fed. Cases, 318, No. 14744; s. c. 1 Hughes 552. It is true, that in this case the learned District Judge who wrote that opinion does express an opinion hostile to our position; but, by way of comment it might be suggested that upon a careful analysis of the case, it will be seen that while the point is discussed, the decision was based chiefly upon the ground that the two offenses were not, in the Court's view, really identical. Two distinct and independent laws had

been violated by the defendant, to-wit: The 57th Article of War, enacted by Congress in 1806, making it a military offense to hold any correspondence with, or give any intelligence to the enemy; and a penal act of Congress, of 1862, making it a crime to give aid and comfort to the rebellion. The two offenses the Court held, were in no sense identical, as the facts, upon which conviction could have been had under the 57th Article of War would not have supported a conviction under the act of 1862. One offense was purely military, while the other and greater was made treason by the Act of Congress; the military court might have tried the offender for both offenses; but, as a matter of fact, had tried him for the lesser and military offense only. But even if that case was held to be an authority against us it stands alone among our adjudications upon this subject.

Moreover, the case of *Moore vs. Illinois*, 14 Howard, 17, cited by the Court in Cashiel's case, fails utterly, upon examination, to support the conclusion of that court upon the point in question. In the Illinois case, the point decided was simply that a person committing an act, which violated both a State and Federal law, was amenable to both jurisdictions, and could be punished by each. This conclusion was based upon the well known and familiar doctrine of dual sovereignty. As is said in the opinion of the court, "Every citizen of the United States is also a citizen of a State or territory * * * and may be liable to punishment for the infraction of the laws of either.

The same act may be an offense or transgression of the laws of both." It is seen therefore, that this case does not even remotely support the contention, that a person may be twice placed in jeopardy of punishment for the same offense against the same sovereign.

It is submitted, therefore, that the doctrine announced by the District Court in Cashiel's case is neither supported by the facts of that case, nor precedent of law; and that, on the contrary, the law has been correctly declared in the cases of Kepner and Colley, *supra*.

FORMER TRIAL

It is respectfully submitted, that it remains for plaintiff to establish that he has been tried and acquitted:

(a). *By a lawfully constituted court, having jurisdiction of his person and the subject matter.*

(b). *Upon a valid indictment.*

(c). *For the same offense alleged in the indictment upon which he was tried in the court below.*

(*a*)

Was the general court-martial which tried the accused lawfully constituted, and vested with jurisdiction of the person of the accused and the subject matter of the offense?

This is the crucial point:

That general courts-martial have jurisdiction

of crimes, as well as purely military offenses, when committed by persons of the military establishment is well settled and has long been accepted by the Supreme Court of the United States.

It may be well, however, to make a brief *resume'* of the authority whence this power has been drawn, and the precedents wherein it has been upheld.

The Constitution of the United States provides in Section 8, Article 1, that "Congress shall have power to make rules for the government and regulation of the land and naval forces." Pursuant to such power Congress, by statute, has enacted rules for the government and regulation of the Army, known as "Articles of War," Section 1342, R. S. Article 2 of said Section provides:

> Article 2. These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation, in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war." This oath may be taken before any commissioned officer of the Army.

The force and effect of this oath, which every enlisted man is required to take voluntarily within six days after his enlistment is to place the soldier directly within the power of courts-martial to try and determine any offense he may have committed in contravention of the Articles of War.

Ex parte Milligan, 71 U. S. 123.

When therefore a court-martial has been instituted for the purpose of trying any person in the military establishment for any offense, and that offense is shown to have been perpetrated while such person is subject to the rules and regulations of the Army, then it must be conceded that the court has full jurisdiction and power to arraign, try and sentence the offender pursuant to the provisions of said Article of War; and that power is as inherent in that court, as the power of any civil court to arraign, try and sentence any person for an offense against the civil law of which it has cognizance. In other words, courts-martial are lawful tribunals authorized by the Constitution, and have as complete power and authority to try and finally determine any cause before them over which they have jurisdiction, as any other court under the Constitution of the United States.

It has been uniformly held by the civil courts, that the jurisdiction of courts-martial over offenses in violation of the Articles of War is as inherent as that of any court constituted under the Acts of Congress.

In *Ex parte* Davison, 21 Fed. Rep. 620, Judge

Wallace, discussing the powers of courts-martial, says:

> Courts-martial are lawful tribunals existing by the same authority that this court is created by, have as plenary jurisdiction over offenses by the law military as this court has over controversies committed to its cognizance, and within their special and more limited sphere are entitled to as untrammeled an exercise of their powers.

In *Ex parte* Reed, 100 U. S. 13, which appertains to the use of the writ of habeas corpus to review the proceedings of a naval court-martial, the Court held:

> The court had jurisdiction over the person and the case. It is the organism provided by law, and clothed with the duty of administering justice in this class of cases. * * Its judgments, when approved, as required, rest on the same basis and are surrounded by the same consideration which gives conclusiveness to the judgment of other legal tribunals including as well the lowest as the highest, under like circumstances.

In Re McVey, 23 Fed. Rep. 878, it is held:

> It is not denied that within the sphere of their jurisdiction, the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort.

So much for the general power and jurisdiction of courts-martial.

It follows, that as the plaintiff belongs to the military establishment, the general court-martial by which he was tried unquestionably had jurisdiction of his person. But it is gravely contended by the appellee that, while the general court-martial has jurisdiction to try military offenders, such jurisdiction is limited to offenses of a military character in the nature of infractions of military discipline, and that, in time of peace, it is without jurisdiction of crimes *per se*, or in other words offenses against the peace and dignity of the State.

On the contrary we contend that the jurisdiction of the general court-martial is not so limited; and that in time of peace, its jurisdiction extends under the 62d Article of War to all crimes not capital, as well as to those purely military offenses constituting conduct to the prejudice of good order and military discipline—the jurisdiction of the particular crime being derived from the fact of its having been committed by a person belonging to the military establishment.

The 62d Article of War reads as follows:

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial,

> according to the nature and degree of the offense, and punished at the discretion of such court.

Let us inquire as to the scope of this article.

The Articles of War were not designed to be a complete penal code enumerating all the offenses of which officers and soldiers may be guilty. Some of the most serious offenses are not specifically mentioned; for instance, officers making false reports or statements, or signing false certificates; and no specific article exists for the punishment in time of peace of the numerous offenses laid down in the 58th Article of War, the provisions of which are limited to time of war. But the 62d Article of War is comprehensive enough to supply this deficiency and it has been so construed by the highest authority.

> Its policy is to provide a general remedy for a wrong which had not elsewhere been provided for.
>
> Samuel's Mil. Law, p. 688, 1816.
>
> There is scarce any impropriety of conduct or irregularity which an officer or soldier may commit that may not be brought under the 70th Article of War.
>
> Kennedy's Mil. Law, p. 34, 1847.

(This article is the English Article of War from which the present 62d of the American Articles was taken.)

> The 70th Article of War is the most useful of the whole.
>
> Napier's Remarks on Mil. Law, p. 58, 1837.

The language used by Chief Justice White in *ex parte* Mason, 15 Otto, 696, (s. c. 105 U. S. 696, 26 L. 1213) is particularly applicable to the case at bar. Mason, who was sergeant of the guard, assaulted and attempted to assassinate Guiteau, the assassinator of President Garfield, and was in due course tried by general court-martial, convicted, and sentenced to be dishonorably discharged from the service and confined in a penitentiary for eight years. His case was brought up on writ of habeas corpus before the Supreme Court of the United States, and the contention made in his behalf that military tribunals had no jurisdiction *per se* of other than military offenses.

> The choice of the tribunal by which he (Mason) is to be tried has not been given to the offender. He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether, after trial by the court-martial he can be again tried in the civil courts, is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction. It is objected that the sentence is in excess of what the law allows. The 97th Article of War is as follows:

"No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory or District in which such offense may be committed, or by the common law, as the same extists in such State, Territory or District, subject such convict to such imprisonment."

Under this Article when the offense is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true, when the offense, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act, charged as "conduct to the prejudice of good order and military discipline," is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear, a court-martial is authorized to inflict that kind of punishment. (The italicizing is ours.) *The act done is a civil crime and the trial is for that act.* The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only *criminal, according to the laws of the land, but prejudicial to the good order and discipline of the Army to which he belonged.*

See also *Carter vs. Roberts*, 177 U. S. 496.

Carter vs. McClaughry, 183 U. S. 365.

In the latter case Chief Justice Fuller in the opinion at page 397 said in passing upon the jurisdiction of courts-martial in cases arising under the 62d Article of War:

> The construction would not be unreasonable if it were held that the words "though not mentioned in the foregoing Articles of War" meant "notwithstanding they are not mentioned," and that the article was intended to cover all crimes, whether previously enumerated or not. The reference is to crimes created or made punishable by the common law or by the statutes of the United States, when directly prejudicial to good order and military discipline.

And in the light of these authorities, it would seem that the jurisdiction of the general court-martial over the subject matter of the offense—manslaughter—is beyond question.

As we have seen, the only limitation, in time of peace, which is placed upon courts-martial as to crimes properly cognizable under the 62d Article of War, is that such crimes shall be "not capital." In other words, in time of peace, courts-martial may not impose the death penalty, under this Article.

Under the 58th Article of War, in time of war the jurisdiction of military courts of the crimes therein enumerated is exclusive. In peace, under

the 62d article, such jurisdiction is concurrent as to all the crimes "not capital," enumerated in the 58th article.

(*b.*)

The charge and specifications upon which the plaintiff was arraigned and tried in the general court-martial, conformed to the pleading and practice of military courts, was sufficient to support a valid judgment, and cannot be attacked in any collateral proceeding.

Neither this court, or any other civil tribunal has jurisdiction or authority to adjudicate any question relative to the sufficiency of the pleading and practice of courts-martial, or to undertake any inquiry as to the proceedings of a court-martial, except for the purpose of ascertaining two things: First, whether the court had jurisdiction of the person, and the subject matter of the offense. Second, whether, having jurisdiction and having arrived at its conclusions, the sentence imposed is warranted by law. A court-martial, as a legally constituted court, having the jurisdiction, has the right to determine for itself the practice and procedure under the Articles of War, and whether or not the charges and specifications are properly pleaded.

In re McVey, 23 Fed. Rep. 878, the court said:

> The only authority of the civil courts is "to inquire whether the military authorities are proceeding regularly within

> their jurisdiction. If they are, we cannot interfere, no matter what errors may be committed in the exercise of their lawful jurisdiction."

In re Eckart, 166, U. S. 492, it was held:

> That a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment, is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned upon habeas corpus, because lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime.

In the case at bar, however, we are not aware that the validity or sufficiency of the indictment, upon which the plaintiff was tried and judgment rendered by the court-martial, has been ever questioned.

(*c.*)

Is the offense with which the plaintiff is charged, and for the commission of which he now stands in jeopardy of punishment, in fact identical with that of which he was acquitted by the judgment of the general court-martial?

The rule of law on this point is clearly stated by the text writers, and has been applied in a host of cases arising in nearly every state of the Union. In some respects the precedents are conflicting,

but it seems that the weight of authority sustains the rule as laid down in the American and English Enc. of Law, Vol. 2, p. 247, where it stated:

> On a plea of former acquittal, the true test to determine whether the accused has been put in jeopardy for the same offense is, whether or not the facts alleged in the second indictment, if proven to be true, would have warranted a conviction on the first indictment, or whether or not the second case is precisely the same transaction as the first.

The test was applied in the following cases:—

In *Hoffman vs. State*, 20 Md. 425, it is said:

> Article 5 of the Amendments to the Constitution of the United States, viz:—"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"—means nothing more than that when there has been a final verdict, either of acquittal or conviction, on an adequate indictment, the defendant cannot be a second time placed in jeopardy for the particular offense.

In *Holt vs. State*, 38 Ga. 137:

> The plea of *autrefois acquit* is sufficient whenever the proof shows the second case to be the same transaction as the first, athough the offense is called by another name.

In *State vs. Cooper*, 13 N. J. Law, 361:

(Opinion p. 371.)

> Upon this principle, are founded the plea of *autrefois acquit*, and *autrefois convict*. The writers on the subject concur in stating that these pleas "must be upon a prosecution for the same identical act and crime," 3 Bl. Com. 336, Ch. C. Law, 1st vol. p. 452, 462. But, says Chitty, p. 455, "It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge upon an indictment for manslaughter upon the same person, because the latter charge was included in the former, and if it had so appeared on the trial the defendant might have been convicted of the inferior offense; and on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for if he were innocent of the modified crime, he could not be guilty of the same fact, with the addition of malice and design.

In *State vs. Cameron*, 50 Tenn. 78:

> A person's acquittal on an indictment for the embezzlement of revenue by "falsely pretending that said revenue was taken from him by robbery" is a bar to a subsequent indictment for failing to pay over the same moneys.

In *Dill vs. People*, 36 Pac. 229 (Colo.) it is held:

> In determining whether or not a plea of *autrefois acquit* is sufficient in law in a case of this kind, the following may generally be regarded as the proper test: Was the matter set out in the second indictment admissable as evidence under the first, and could a conviction have been properly maintained upon such evidence? If yes, then the plea is sufficient; otherwise, it is not.

Wilson vs. State, 24 Conn. 57.

> Generally, to constitute a legal identity between the two offenses, so as to make an acquittal or conviction of one an available defense against a prosecution for the other, it is necessary that the averments of the second information should be such that, if proven, they would have warranted a conviction under the first.

Roberts vs. State, 14 Ga. 8.

> The plea of *autrefois acquit* is sufficient where the evidence necessary to support the second indictment would have sustained the first, and also whenever the proof shows the second case to be same transaction as the first.

State vs. Keogh, 13 La. Ann. 243.

> The test as to whether the plea of *autrefois acquit* is a sufficient bar in any particular case is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.

Commonwealth vs. Morgan, 9 *Kulp* (Pa.) 573.

Commonwealth vs. Robey, 29 Mass. 496.

Commonwealth vs. Wade, 34 Mass. 395.

State vs. Birmingham, 44 U. S. 120.

Price vs. State, 19 Ohio, 423.

State vs. Copeland, 46 S. C. 13.

Parchman vs. State, 2 Tex. App. 228.

Now, upon the application of the rule of construction established by these authorities to the facts of the case presented in this form, can any doubt remain as to the identity of the offense alleged in the indictment with that for which the plaintiff was tried by the court-martial? Is it not the same transaction? The two cases rest upon the same facts, and have been testified to by the same witnesses. The accused is the same, and he is charged with the homicide of the same person, at the same time and place, and under the same circumstances. What more could be asked to establish the identity of the transaction set forth in the two records?

But we are told, that though the facts upon which the two cases rest are the same, yet the offense is not identical, inasmuch as the charge in the Court of the First Instance was "assassination" while in the military court it was "homicide".

In reply to this proposition, it is respectfully submitted that the government cannot legally,

for the same transaction, put a person in jeopardy a second time by simply calling the offense another name. The principle of construction in this respect is said to be:

> But when the legal bar has once attached, the Government cannot avoid it by varying the form of the charge in a new accusation. If the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attaches to the first must constitute a protection against the trial on the second. (Cooley's Cons. Lim. 401.) And

> If it appears that the second case is for the same transaction as the first, it is immaterial if the offense is called by a different name. A. E. E. Law, Vol. 11, p. 935, 1st Ed.

It is not necessary to establish the defense "*autrefois acquit*" or "*convict*" that the offense in each indictment should be the same in name. If the transaction is the same, or if each rests upon the same facts between the same parties, it is sufficient to make good the defense.

Bishop Crim. Law (7th Ed.), Sec. 1050.

Hirschfield vs. State, 11 Tex. App., 207.

Moore vs. State, 71 Ala. 307.

Holt vs. State, 38 Ga. 187.

But even granting the validity of the charge of "assassination" or "murder" against the accused, he having once been tried for the lesser offense of "manslaughter," which is included in the greater offense of murder, cannot legally be put in jeopardy a second time upon an indictment charging the greater offense of "murder."

> Where a greater offense includes a lesser one, being placed in jeopardy under an indictment for the included offense only, constitutes a bar to a prosecution for the greater offense; so, upon a trial for the higher grade of an offense consisting of degrees, if the defendant is convicted of an inferior grade, such conviction operates as an acquittal of, and will bar a subsequent prosecution for any of the higher grades; and where such a conviction is reversed and a new trial ordered, the new trial must be confined to the particular charge upon which the defendant was found guilty on the former trial. American and English Encyclopedia of Law, Vol. 11, p. 939, 1st Ed. See also numerous authorities there cited.

> A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offense, or for an offense of a higher degree, and necessarily including the offense for which the accused stands indicted. It follows that a con-

> viction or acquittal for a minor offense is no bar to a prosecution for a greater offense, *except in the case of acquittal for manslaughter which would bar an indictment for murder, for the reason that if the defendant was innocent of the killing, without malice, he could not be guilty of the killing with malice. Scott vs. U. S. Morris*, 142; *Hunt vs. State*, 25 *Miss.* 378; *Burns People*, 1 *Parker*, 182.

State vs. Foster, 33 *Iowa*, 526.

In *Commonwealth vs. Roby*, 12 Pickering, (Mass.), in the opinion at page 503, the Court says:

> Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder. 1 Stark, Cr. Pl. (2d Edit.) 322.

In 12 Cyc. 280 it is said:

> The general rule is somewhat vaguely stated to be that the plea of former

conviction or acquittal must be upon a prosecution for the identical act and crime. This is to be qualified, however, by the statement that the two charges need not be precisely the same in point of degree, for it is enough if an acquittal of the one shows that the defendant could not have been guilty of the other.

Several rules have been laid down by the authorities for determining whether the crimes are identical. One test is to ascertain whether the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first, and if this is the base, then the crimes are assumed to be identical. Another test is to inquire, where the two crimes are not the same, whether they grow out of the same transaction; but this test is correct only in a general way, as a single act or transaction may contain elements, each of which are crimes at common law or under different statutes. The safest general rule is that the two offenses must be in substance precisely the same, or they must be of the same nature or the same species, so that the evidence which proves the one would prove the other; or if this is not the case then the one crime must be an ingredient of the other.

Thus it appears that the law is indubitably that if there is identity of act coupled with identity of result and a charge based thereon is tried by a court of competent jurisdiction, that ends

the matter; and no further trial can lawfully be had by that or any other court.

An acquittal for voluntary manslaughter is a bar to a future prosecution for murder. *Com. vs. Neely*, 2 Chest. Co. Rep. Pa. 191.

In this case, however, the identity of the two alleged offenses has been fixed and determined by the trial judge in the court below beyond all peradventure; for, though charged there with "assassination" he found the plaintiff guilty "of an infraction of Article 404 of the Penal Code, and of the *crime of homicide*," *which is the identical offense that the accused was acquitted of by the court-martial.*

We submit, therefore, that the double jeopardy of punishment in which the plaintiff has been put is actual and real.

Had he been found guilty by the court-martial, he might have been subject to a punishment of life imprisonment in Bilibid, while the court of First Instance has imposed a sentence of twelve years and one day.

Let us suppose that a conviction had been had by the court-martial, and a sentence of five years' imprisonment imposed upon and served by the defendant, and then he had been brought to trial in the Court of First Instance, convicted and given a term of ten years' imprisonment.

Could it be denied that the defendant had been punished twice for the same offense?

It is asked, therefore, that this court give to the words, "No person for the same offense shall be twice put in jeopardy of punishment," that plain meaning which they have in the jurisprudence of the United States—and which constitutes them that bulwark of human rights which has ever been our safeguard against illegal oppression.

II

OFFICERS AND ENLISTED MEN OF THE UNITED STATES ARMY SERVING IN THE PHILIPPINE ISLANDS BY VIRTUE OF MILITARY ORDERS, ISSUED BY AUTHORITY OF THE CONSTITUTION AND LAWS OF THE UNITED STATES ARE ENTITLED TO THE FULL BENEFIT OF THE GUARANTIES OF THE CONSTITUTION AS TO TRIAL BY JURY.

The guaranties as to trial by jury are found in Art. III, Section 2, of the Constitution, "* * * The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed," and in Article V and VI of the Amendments to the Constitution, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

Can it be that a soldier, whose primary duty, as such, is to uphold the Constitution, which is the basis of the Federal Government, while doing that duty, can be deprived of rights that were his at the time he became a soldier and which he did not then surrender? It must not be forgotten that he was a citizen before he was a soldier and all rights were his that belonged to any citizen. When he enlisted he simply surrendered one right of a citizen and one right only, to-wit: the right of a trial by jury in those cases which the law makes triable by court-martial. When he became a soldier he consented, if he violated, or was charged with violating, any of the Articles of War, to be tried by a court-martial without the intervention of a jury, as that word is usually employed; but he never agreed, and the law did not declare, that when he became a soldier he was deprived of the right of a trial by jury if charged with an offense other than military, and tried by a court other than a court-martial. To hold with the Government in this matter is to say that one, by whose services the Constitution is sustained and the Government lives, has fewer rights than one who simply is a beneficiary of those governmental benefits.

Notwithstanding the decision of this Court in the case of *Dorr vs. The United States*, 195 U. S. 138, we contend that the plaintiff, a soldier of the United States Army, present in the Philippines, not from choice, but taken there without his consent and serving there by orders issued upon authority derived from the Constitution, is entitled to the protection of all of his rights of citizenship, including that of trial by jury, which are guaranteed by the Constitution, and especially as to acts done in the performance of his duty as a soldier.

It seems to us that there is a wide distinction between the case of a civilian, who *voluntarily* elects to go to those islands and take up his residence for pleasure or profit, submitting himself advisedly to the law of the land, and that of a soldier in the Army, who is ordered there by the constitutional authority for the purpose of maintaining the sovereignty of the United States. Can it be true that the officers and men of the Army, who are ordered to this territory for the purpose of maintaining the supremacy of the United States under the Constitution, forfeit their most cherished rights of citizenship by obedience to such orders?

It is true as noted in *Dorr vs. U. S.*, that Congress, in legislating for the Philippines, had expressly provided that Section 1891 of the Revised Statutes of 1878, shall not apply to the Philippine Islands. This is the section giving

force and effect to the Constitution and Laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere in the United States. By strict construction of this Act, it would follow that no provision of the Constitution or Laws of the United States would be effective in the Philippines, except such as are expressly enacted by Congress for the government of the territory. But, can this apply to the provisions of the Constitution and laws that relate to the personnel of the Army? If so, the Army serving in the Philippines, would be subject to no discipline,—no law of the United States, and military courts would be deprived of legal authority for the punishment of military offenders.

The Army is raised and supported by authority of the Constitution (Art. I, Sec. 8, clause 12,) governed and regulated by authority of the Constitution (Art. I, Sec. 8, clause 14), is ordered beyond the boundary of the domestic authority of the United States by authority of the Constitution (Art. IV, Sec. 3, clause 2), and is disciplined under the Articles of War (Sec. 1342, R. S.). Now, it is our contention that to the Army and its personnel, all of these provisions, and *every* provision of the Constitution are ever present. They are effective of themselves and of their own force in all domestic territory of the United States, and they are extended to territory nondomestic or foreign upon the doctrine of exterritoriality.

In this sense, though subject to the sovereignty of the United States, the Philippine Islands are non-domestic or foreign territory, just as much as Cuba is at the present time. This territorial status is established by the decisions of this court in *Dorr vs. U. S.* 195 U. S. 138, and *Downes vs. Bidwell*, 182 U. S. 244. As was said by Mr. Justice Day in *Dorr vs. U. S.* (opinion p. 144), "That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes vs. Bidwell*" * * * * and "The legislation upon the subject shows that * * * * * * Congress has hitherto refrained from incorporating the Philippines into the United States."

And, as held in *Downes vs. Bidwell, supra*, "So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws; but those laws concerning 'foreign countries' remain applicable to the conquered territory until changed by Congress."

If then it is conceded, as it seems it must be, that the Philippine Archipelago is non-domestic territory to whose people the Constitution and

and laws of the United States not only do not extend of their own force, but from whom they are expressly withheld by Congress, it is submitted, that from the very necessity of the case such Constitution and laws, as far as the Army is concerned, must extend to that territory upon the principle of exterritoriality.

This doctrine of exterritoriality, called by some law writers a fiction of international law, by which certain classes of aliens are exempted from the control of the law in the land of their temporary sojourn, is well established, and is peculiarly applicable to the armed forces of a sovereign power serving in non-domestic or foreign territory, as for instance the Philippines and Cuba. "The organized armed forces of a state, representing its sovereign power, are never subjected to the jurisdiction of another State, if they are temporarily within its territory." Snow International Law, page 23.

> It is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offenses committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow of the case being watched. The existence of a double

> jurisdiction in a foreign country being scarcely compatible with the discipline of an army, it is evident that there would be some difficulty in carrying out any other arrangement. Hall International Law, page 206.

In *Coleman vs. Tennessee*, 97 U. S. in the opinion p. 509 it is said:

> It is well settled that a foreign army, permitted to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of the Exchange, 7 Cranch, 139, to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions: "In such case without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force."

Under this law of exterritorialty, the personnel of the Army and Navy, whether upon the high seas, in a friendly port, or non-domestic or foreign territory, or in enemies' country, wherever they may be by the authority of the United States, are entitled to the protection of the Constitution and laws of the United States, and are answerable under those laws to their sovereign alone.

This principle, as we have seen, is alike essential to the sovereign and to the personnel of its armed forces. Essential to the sovereign for the government, control and discipline of its army, and without which the sovereignty could not be upheld; and essential to the individual soldier for his protection in the enjoyment of the rights guaranteed him by the Constitution, when he is forced by the terms of his enlistment to serve his sovereign in foreign or non-domestic territory.

We therefore submit that the officers and soldiers of the Army do not forfeit their rights of citizenship under the Constitution by reason of their foreign service in the Philippines, but that they are entitled to the protection of its guaranties there, as fully as if they were still within domestic territory of the United States.

III.

THE CIVIL COURTS OF THE PHILIPPINE ISLANDS HAVE NO JURISDICTION TO TRY A SOLDIER OF THE UNITED STATES FOR AN ACT DONE IN THE PERFORMANCE OF MILITARY DUTY IMPOSED UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

The principle of law stated in the foregoing proposition is well settled by the Circuit and Supreme Courts of the United States.

This Federal protection is thrown around all officers or agents of the United States Government while in the performance of duty imposed upon them by the Constitution and laws of the United States.

In the case of *In re* Fair, 100 Fed. Rep. 155, where soldiers, whose duty it was to apprehend an escaping deserter, shot and killed the deserter in attempting to make the arrest, and for so doing were held for murder by the State Court of Nebraska, it was held: "If then the petitioners acted under such order in good faith, without any criminal intent, but with an honest purpose to perform a supposed duty, they are not liable to prosecution under the criminal laws of the State."

Again in the Lewis case, 83 Fed. Rep. 159, upon the same principle, it is said by the Court, "where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority,

and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part, he does not become liable to answer to the criminal process of a different government. * * * * With our complex system of government, State and National, we would be in an intolerable condition if the State could put in force its criminal laws to discipline the United States officers for the manner in which they discharge their duties."

And as said by Mr. Justice Strong in *Tennessee vs. Davis*, 100 U. S. 257: "The General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. It can act only through its officers and agents, and they must act within the States. * * * * If, when thus acting, and within the scope of their authority, those officers can be arrested, and brought to trial in a State Court for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection; if their protection must be left to the action of the State Court, the operations of the General Government may at any time be arrested at the will of one of its members. * * * *

"We do not think such an element of weakness is to be found in the Constitution. The

United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

The same principle is clearly enunciated by Mr. Justice Miller, in Neagle's case, 135 U. S. 1, where it is held, that an officer or an agent of the United States is answerable to the constitutional courts of the United States only for acts done by authority of, or in the discharge of duties arising under, the Constitution and laws of the United States.

See also *In re Grimley*, 137 U. S. 147; *U. S. vs. Clark*, 31 Fed. 710; *In re Waite*, 81 Fed. 359.

Now then, in the light of these decisions, was the accused an officer or agent of the United States, and was the act complained of done in the performance of duties arising under the Constitution and laws of the United States? We submit that this interrogative must be answered in the affirmative.

It has been established, and appears from the record, that the accused was regularly enlisted in

the Army of the United States; that on the 24th day of July, 1904, he had been regularly detailed as a private of the guard, and posted as sentinel by proper military authority; that at the time of the shooting he was walking his post; that he acted entirely without malice; that conditions existed which caused him to believe that the garrison and property of the United States was in danger; and that he honestly believed himself to be attacked by the two natives. Under these conditions the fatal shots were fired; and, it is respectfully submitted that every element was present to bring the incident within the principle of the law established by the cases cited.

Though but an humble soldier, the accused walked his post as the armed representative of the sovereign power of the United States for the purpose of protecting the property and rights of his sovereign, by order of the President of the United States. The attack made upon him was an attack upon the sovereignty of the United States; and, whether or not an error of judgment was made as to the degree of force necessary to repel the attack, the shots were fired by the accused in the discharge of duties devolving upon him under the Federal Constitution and laws.

We therefore contend, in view of the facts, and authorities cited, that the Court of First Instance was utterly without jurisdiction of the person of the accused or of the offense with which he was charged.

These courts of the Philippine Islands are not in any sense constitutional courts of the United States. They are legislative courts, created by virtue of the general right of sovereignty, which exists in the government, or by virtue of that clause of the Constitution which enables Congress to make laws regulating the territories belonging to the United States. The jurisdiction, with which they are invested, is not a part of the judicial power which is defined in the third Article of the Constitution, but is that which is specially conferred by Congress.

Reynolds vs. U. S. 98 U. S. 145.

Good vs. Martin, 95 U. S. 90.

Canter's Case, 2 Pet. 552; 7 L. Ed. 517.

McAllester vs. U. S. 141 U. S. 174; 35 L. Ed. 693.

Let us then inquire more particularly as to the jurisdiction of the courts of First Instance over offenses committed by persons of the military establishment.

Under the Spanish Government prior to the treaty of Paris such jurisdiction was specifically withheld.

Article 10 of the Spanish Military Code in force in the Philippines prior to the American occupation, is as follows:

> The Military Courts are the only competent courts to try cases for offenses

not excepted, [and no exceptions are named], committed by military persons of all ranks in active service, and by the employes and officials of the War Department in the same positions, whether they are, the ones or the others, in the exercise of their offices or acting as substitutes, supernumerary or with temporary leave, providing they form a part of the Arms, Corps, Institutions and establishments of the Army, even when of a fortuitous character, while they are dependents of the Ministry of War, and receive salary or pay from the appropriation for the same.

The status and powers of these courts during the period of military occupancy is shown by the following orders:

HEADQUARTERS OF THE PACIFIC AND EIGHTH ARMY CORPS.

Manila, P. I., August 23, 1898.

General Orders
No. 8

EXTRACT

II. The local Courts, continued in force for certain purposes in proclamation from these Headquarters, dated August 14, 1898, shall *not exercise jurisdiction* over any crime or offense committed by any person *belonging to the Army of the United States*, or any retainer of the Army, or person serving

with it, or any person furnishing or transporting supplies for the Army; nor even any crime or offense committed on either or the same by any inhabitant or temporary resident of said territory. In such case, except when courts-martial have jurisdiction, jurisdiction to try and punish is vested in Military Commission, and the Provost Court, as hereafter set forth.

OFFICE OF THE MILITARY GOVERNOR OF THE PHILIPPINE ISLANDS.

Manila, P. I., ~~August~~ October *7, 1898.*

General Orders }
No. 8. }

Until otherwise directed from these Headquarters, the Civil Courts, as composed and constructed by the laws of Spain, which were held and administered prior to August 13, 1898, within Philippine territory now subject to United States military occupation and control, are permitted to resume at once the exercise of the civil jurisdiction conferred by Spanish laws within the limits of that territory, subject, however, to such supervision by the Military Government of the United States, here instituted, as in its judgment the interests of the government may demand. This privilege does not extend to or embrace permission to institute *criminal* proceedings or to exercise criminal jurisdiction of *any nature or character whatsoever.*

OFFICE OF THE UNITED STATES MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS.

Manila, P. I., June 5, 1899.

General Orders
No. 21.

The Courts of First Instance of the Province of Manila, and the Courts of Peace, heretofore held in the city of Manila, P. I., are hereby re-established and will exercise the jurisdiction, civil and criminal, possessed by them prior to August 13, 1898, in so far as compatible with the supremacy of the United States in the Philippine Islands, and the exercise of Military Government therein, and will administer the laws recognized as continuing in force by proclamation from these Headquarters dated August 14, 1898, except in so far as these laws have been, or hereafter may be, modified by authority of the United States.

OFFICE OF THE UNITED STATES MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS.

Manila, P. I., June 17, 1899.

General Orders
No. 22.

I. The Supreme Court of the Philippine Islands and the Courts of First

> Instance and of Peace of the Province of Manila, re-established in General Orders No. 20 and 21, c. s., this office, are announced as open and in the exercise of their jurisdiction, civil and criminal, on and after Wednesday, June 21, 1899. * * * *
>
> II. The *jurisdiction* of the courts specified in paragraph 1, of this order, and of other civil courts which may hereafter be re-established, *shall not extend to include crimes and offenses*, committed by either citizens or of *persons* sojourning within the Philippine Islands, *which are prejudicial to military administration and discipline*, except by authority especially conferred by the Military Governor. Jurisdiction to try and award punishment in the class of cases designated remains vested in provost courts, courts-martial or military commissions.

The foregoing excerpts outline the history of the jurisdiction and powers of Courts of First Instance during the period of military occupancy, and until June 11, 1901.

The present judiciary for the Islands was established under an act passed by the Commission, June 11, 1901:

> Sec. 2. The judicial powers of the government of the Philippine Islands shall be vested in a Supreme Court, Courts of First Instance, and Courts of Justice of the Peace, together with such

special jurisdictions of municipal courts, and other special tribunals as now or hereafter may be authorized by law. The two courts first named shall be courts of record.

Sec. 56. Courts of First instance shall have jurisdiction:—

6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed.

* * * * * * * * * *

Sec. 65. The existing Courts of First Instance are hereby abolished, and the Courts of First Instance provided by this act are substituted in place thereof.

Under this act the jurisdiction of Courts of First Instance was not enlarged to include military offenses. Even had an attempt been made to grant such jurisdiction, the effort would have been, at that time, futile—since that time was one of insurrection; for officers and soldiers of the Army of the United States are not subject to the laws of a State or territory in a state of insurrection against the authority of the United States, nor answerable to its tribunals for offenses committed by them during the war. They are answerable only to their own government, and only by its laws as enforced by its armies, could they be punished.

Coleman vs. Tennessee, 97 U. S. 509.

On July 1, 1902, Congress passed an Act, "temporarily to provide for the administration of the affairs of Civil Government in the Philippine Islands and for other purposes."

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the action of the President of the United States in creating the Philippine Commission and authorizing said commission to exercise the power of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine commission, dated April seventh, Nineteen Hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the power of government to the extent and in the manner and form set forth in the executive order dated June twenty-first, Nineteen Hundred and One, and in establishing four executive departments of government in said islands as set forth in the act of Philippine Commission entitled "An act providing an organization for the department of the interior, of commerce and police, of finance and justice, and of public instruction," enacted September sixth, Nineteen Hundred and One, is hereby approved, ratified and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all

laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: "By authority of the United States be it enacted by the Philippine Commission." The provisions of section Eighteen Hundred and Ninety-one of the Revised Statutes of Eighteen Hundred and Seventy-eight shall not apply to the Philippine Islands.

* * * * * * * * * *

Sec. 9. That the Supreme Court and Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said Government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the Supreme Court shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the Commission until otherwise provided by Congress. The judges of the Court of First Instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission; *Provided*, That the admiralty jurisdiction of the Supreme Court and Courts of First Instance shall

not be changed except by act of Congress.

Hence, it seems to us, the conclusion follows, that when Congress vested in the Courts of First Instance such *"jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands,"* and jurisdiction over persons belonging to the Army of the United States, or offenses committed by such persons, never having been *"heretofore provided or prescribed by the government of said islands,"* nor since, for the Courts of First Instance, these courts are clearly without jurisdiction of such persons and such offenses.

It is respectfully submitted that the reasons set forth in the line of decisions quoted *supra* why exclusive jurisdiction of all questions relative to federal authority and acts done by officers and agents of the United States in the performance of duty is vested in the constitutional courts of the United States, are far more potent in the Philippine Islands than in the United States.

If the sovereign power and authority of the federal government under the Constitution, and the official acts of its officers and agents, are jealously guarded in the States composing the Union, and from whom the federal authority derives its power, whose laws are indigenous to American soil and in harmonious accord with the Federal Constitution, and administered by officials, who are necessarily citizens of the United

States, we submit that every element of that sovereignty should be more jealously guarded in the Philippine Islands, but recently subjugated, and not incorporated into the United States, whose citizens are not citizens of the United States, and whose laws are based on the Spanish Code, and are not necessarily administered by citizens of the United States.

In the case at bar, for instance, we have a federal agent,—a citizen of the United States, tried under the Spanish Code, and convicted by three judges, who are not citizens of the United States, for an act done in direct performance of a federal duty.

If it is admitted that the Courts of First Instance are authorized to take jurisdiction of, and hold sentinels or other officers of the United States accountable for acts done by them in the performance of duty imposed upon them by proper constituted authority, it would seem to follow that these courts would have like authority to question the instructions given to sentinels and their superior officer by the commanding officer, as prescribed in the regulation for the army by the President, in virtue of the power vested in him by the Constitution as Commander-in-Chief of the Army and Navy.

It is a very grave question, whether or not the Court of First Instance is, in any sense, a United States court. It is true that the caption

of the indictment, as of all others, reads "THE UNITED STATES" vs. the accused. But by what authority is the name of the United States used in these islands in criminal prosecutions? The court cites by authority of the United States, but the judge presiding is appointed by the civil governor of the Philippine Islands and holds his commission as a judge of "The Court of First Instance," for a stated district of the Philippine Islands. He is not appointed or commissioned as a United States Judge.

The laws administered are laws of the Philippine Islands, and offenses committed are offenses against the Philippine Islands and the people of those islands.

It would seem therefore that all indictments there should run in the name of the Philippine Islands.

By the act of July 1, 1902, Congress erected a complete civil government for the Philippine Islands. By this act there was established a complete and separate government for the Islands, endowed with all the distinctive functions of government, executive, legislative, and judicial. Congress, then, has legislated,—established a government in and for the Philippines, and conferred other than the usual powers of a territorial government. It is a complete, separate and distinct government of itself, having all the usual machinery for the exercise of its functions, though set

up by the authority of the United States. Such being the case, is not the government, which has been created there, colonial in form, something more than the territorial governments which heretofore have been organized by Congress. We submit that such is the case, and that officers and agents of the United States are not amenable to trial in the courts of the Philippine Governments for acts done in the performance of duties which devolve upon them under the Constitution and laws of the United States upon indictments alleging that such acts constitute infractions of the *Penal Code* of the *Philippine Islands*.

IV.

THE PLAINTIFF SHOULD HAVE BEEN DISCHARGED UPON THE MERITS OF HIS DEFENSE.

(a). *Because his action was justified by the law of self-defense.*

(b). *Because the subject matter of the offense is an act done by a sentinel of the U. S. Army, without malice, and in the honest belief that he was in the performance of his duty.*

For the application of the legal principles involved in the defense of the plaintiff in error, a review of the facts is essential, and we believe is as permissable in this proceeding as in the recent case of *De La Rama vs. De La Rama*, 201 U. S. 203. Especially so in this case—a case of mixed law and fact—involving the liberty of the plaintiff in error, as well as the rights and protection afforded a federal agent while in the performance of his duty.

Let us look at the facts as established, considering the personality of the plaintiff, the duty upon which he was engaged, and the circumstances by which he was surrounded; and, upon the application of the two legal principles involved as to the facts, find his innocence or guilt.

(*a*)

Grafton's act was justified by the law of self-defense.

It appears that the plaintiff is an American born citizen, 23 years of age, who enlisted in the regular army of the United States on the 23rd of July, 1903; and that he was present in the Philippines with his regiment the 12th United States Infantry, by virtue of proper orders issued by authority of the President, the Commander-in-Chief of the Army and Navy.

It has been shown by the evidence that his character from a personal as well as a military point of view, is most excellent; that he was free from vicious habits; and that as a soldier he was steady, cool, and possessed of ordinary firmness, judgment, and prudence. Indeed, his officers testified that, if called upon to select a detachment for service requiring the presence of men in whom these soldierly traits were emphasized, the plaintiff would be among the first of those chosen. See evidence of Captain Wickham, R. 58, Lieutenant Harrell, R. 41, and Sergeant Little, R. 69.

It was further shown, that, as a soldier, the plaintiff had considerable experience, having served formerly with the 9th Infantry in China, and the 1st Infantry in Samar; and that he constituted one of the rescue party, which went to the relief of that small remnant of a company of the 9th Infantry which remained after the massacre of Balangigi—noted as the most dastardly act of treachery which has disgraced the dark and bloody record of the insurrection in the Philippines.

On the 24th of June, 1904, this soldier was duly detailed as a member of the guard at the military reservation, Buenavista Landing, Guimeras Island, Philippine Islands, and at two o'clock p. m., was posted as a sentry on Post No. 1. The duty of the sentry was to guard the garrison, and the military stores and property of the United States.

Post No. 1 extended from a hydrant in front of the Commanding Officer's quarters along a military road for about three hundred yards to a coal pile at the dock, passing between two store-houses midway between its termini. In passing between the two store-houses, the sentry's beat lay close beside the store-house on the south side of the road. At various times during the day the plaintiff had observed what appeared to him and other members of the guard suspicious actions and movements on the part of the native population about the reservation, such as boats leaving filled with women, and returning filled with men; natives carrying bolos, and wearing a sullen expression of countenance. These circumstances excited the suspicion of the plaintiff in error and induced in his mind apprehension of danger, and an honest belief that the garrison was to be attacked by the native population. So strong was this belief developed in the mind of the plaintiff that he reported these suspicious circumstances to the Corporal of the guard at about 2:30 p. m., and requested the Corporal to report the same to Lieutenant Harrell,

the Commanding Officer. See testimony of Private Grafton, R. 71, and Corporal Treadwell, R. 65.

Under these antecedent conditions and circumstances, the plaintiff beheld approaching him upon his beat two natives, unknown to him, but in fact Florentino Castro and Felix Villanueva.

Just before reaching the west end of the store-house, Florentino Castro was observed to draw a large knife or bolo from his bosom and conceal it behind his forearm; and continued walking toward the sentry.

The plaintiff already apprehensive and suspicious, and well aware of the customary methods of attack by bolomen in those islands, quit his beat and obliqued across to the opposite side of the road in order to permit the natives to pass unmolested at a safe distance, if they were so inclined. But, on coming nearly opposite the plaintiff, the natives rushed on him, Florintino leading, with the bolo drawn in his hand for attack. There was no time for hesitation or delay, the safety of the garrison and his own life depended upon the accused, the precious moment for action had come, and he fired two shots in rapid succession, the first upon Florentino and the second upon Felix. Both shots were well directed and proved fatal. The shots were fired from the magazine of the rifle and both were fired in less than five seconds. As told by the plaintiff, R. 70:

A. I was at the end of my post about starting to the west point. I arrived at about half way between Lieutenant Harrell's quarters and the store-house. Two natives came out on my post about half way between the store-house and the coal pile on the left. They had climbed over the stone wall and had passed over my post. They advanced directly towards my post. When I arrived at the corner of the store-house they were about the corner of the same store-house at the other end. Just as I started to cross those stones, a native reached in his bosom and pulled out a knife and immediately he changed the handle and concealed the knife upon his arm from my view. Upon seeing that I looked back toward the building on the right of the road coming toward the dock and upon getting near the building they had arrived at a place to my left. Upon gaining this position, the native turned the knife with the point toward me and made a rush at me. At the same time, the other native followed close to him. At the time he did this I brought my piece to my shoulder, threw a cartridge in the *magazine* and fired at him. The other native jumped back toward the quartermaster building. I loaded my rifle and fired at him. Immediately after firing at the second native I hallowed for the guard. As soon as I hallowed for the guard I looked down in the direction the guard was coming from.

Q. Which native did you shoot first, the one in the middle of the road or the one near the store-house?

A. The one in the middle of the road.

Q. Which one had the knife.

A. The one in the middle of the road.

Q. How close was he to you when you fired?

A. About four paces.

Q. How near to you was he when he fell?

A. Not over five paces.

Q. How near did the knife drop to you?

A. Dropped about midway between us.

This testimony of the plaintiff is confirmed by that of Lieutenant Harrell and Captain Davis, and a number of non-commissioned officers and soldiers as to the number of shots fired, and the locality in the road of the plaintiff and the bodies of the two natives and the knife.

These facts in the main particulars were found by the trial judge to be as stated by the plaintiff.

He, however, found that the natives did not rush the sentinel; that at the time when the first shot was fired the natives were twenty or thirty feet distant from the sentinel; and that upon the firing of the first shot Felix Villanueva turned and fled toward the store-house, crouching beside the wall, and was shot in that position. This too is the theory put forward in the majority opinion of the Supreme Court of the Islands.

These findings were based entirely upon the testimony of two natives—Ambrosio Obidalla and Macario Olbe—who claimed to have witnessed the shooting from the vicinity of the coal pile, a distance of about eighty yards.

It was contended in the court below, and it is urged here that these two natives were not eye-witnesses, and that this story was a bald fabrication.

This contention is based upon the fact that, when they were examined in common with other quartermaster employes, by Captain Hutton, shortly after the incident, they both stated that they knew nothing of the incident, and also upon the contradiction of their testimony by reputable and unimpeachable witnesses. For instance, these two witnesses swore positively that three shots were fired by the plaintiff, while Lieutenant Harrell and Captain Davis, and every reputable witness who took the stand testified that only two were fired. So overwhelmingly was the contradiction of the testimony of these two star wit-

nesses for the prosecution, that the court below was constrained to find that only two shots were fired. Yet, as to the position of the deceased and the plaintiff at the time of firing the shots credence was given to the story of these natives rather than to that of the plaintiff.

But, we would ask, if the first shot was fired when Florentino and Felix were thirty feet distant from the plaintiff, how can the fact be explained that Florentino fell within four feet of the plaintiff, and the knife just at his feet? Did Florentino continue to rush upon the plaintiff after being shot, or was plaintiff's statement correct in this particular?

We therefore ask this court to accept the plaintiff's testimony as true, that the natives were rushing upon him, were within ten feet of him when the first shot was fired, and that Felix was shot as he leaped backward upon the first fire, and not while in a crouching position against the wall of the store-house. Upon these facts it is contended that the plaintiff was excusable by the law of self-defense; that if the fatal shot was fired by the plaintiff without malice, in the honest belief that his life was in danger, and such belief would have been entertained by a person of ordinary reason, firmness and judgment; then the action of the plaintiff is justifiable by the law.

We have seen and it has been found by the court below, that the plaintiff acted without malice—the deceased natives being unknown to

him, and that he acted in the honest belief that his life was in danger. It remains, therefore, to inquire if that belief was reasonable, if it would have been entertained by a man of ordinary intelligence, firmness, and judgment.

It is thought that an answer to this question might be found in the finding of the court, that the plaintiff is *a man "of good intelligence, a steady, capable, and efficient soldier, not easily excited or thrown off his guard," and that he acted in the premises without malice or premeditation.*

This is the strongest evidence as to how a man of ordinary intelligence would act under such circumstances; as we submit that any man who valued his life, who was familiar with the character of the natives, and who had seen their deadly work at Balangigi, would have so acted.

The plaintiff was where he had a right to be, and might rightfully defend himself without retreating. As was said by Mr. Justice Harlan, in *Beard vs. U. S.* 158 *U. S.* 564:

> The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but

> was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

See also *Martin vs. State*, 90 Ala. 602; s. c. 8 So. 858.

State vs. Patterson, 45 Vt. 308.

Karr vs. State, 46, Am. State Reports, 17 (Ala.)

It is urged that Felix Villanueva, the second native, was unarmed, and that having desisted from the attack upon the plaintiff, the firing of the second shot was inexcusable.

This conclusion may seem just and reasonable in the calm judicial atmosphere of the court room, where every circumstance connected with the incident is carefully deposited in the scales of thought, weighed and balanced, and the equation finally calculated after an elaborate consultation of precedents and authorities; but we submit that the case is very different with the man who is present in the face of danger. His thought must be like lightning and his action immediate. Therefore, in judging him, the case should be considered as it appeared to the plaintiff, in what seemed to him, the moment of his dire

necessity, and not as it may be made to appear in court by subsequent investigation and legal research.

This distinction is clearly defined by the Chief Justice in the case of *Allen vs. United States*, 150 U. S. 560.

> We do not think that the doctrine is practicable which tests the question whether a defendant exceeded the limits of self-defense or acted in the heat of passion by the deliberation with which a judge expounds the law to a jury or a jury determines the facts, or with which judgment is entered and carried into execution.

But it was held by the trial judge that though he was inclined to believe "that some demonstration was made with the knife" (by the natives), such demonstration was made in a spirit of sport to see what action the sentinel would take, rather than with any intention on their part to assault him or use the knife upon him and "that they had no further design upon the plaintiff than perhaps to increase his nervous condition by frightening him a little by their action." In other words they designed, according to the learned Justice of the Court of First Instance, to bluff and intimidate a sentinel by making a pretense of a bolo rush upon him, just to see what he would do.

A sense of humor as keen as that of the learned judge of the Court of First Instance would

see nothing but harmless pleasantry in cow-boys shooting up a town, and nothing but an innocent jest in compelling a citizen to dance to the pit-pat of bullets aimed at his toes. Surely there must be a more stable foundation on which to rest the rights of a citizen than a judge's perverted sense of the jocular.

But if such was actually the mental attitude of the Filipinos that does not change the acts done by them. It is the *acts* that Grafton saw; the great Searcher of hearts alone knew the purposes behind the acts; and Grafton was justified in acting upon what he saw and cannot be held to have been obliged to have adjudged the acts innocuous because somebody now, on reviewing the situation, believes that the natives did not actually intend to do what they apparently intended to do.

This suggestion of Judge Bates may be best replied to in the language of Mr. Justice Brewer, in the case of *N. O. & N. E. Railroad Co. vs. Jopes*, 142 U. S. 23, where he draws the following conclusions of law from similar facts:

> In other words, the law of self-defense justifies an act done in honest and reasonable belief of immediate danger. The familiar illustration is, that if one approaches another, pointing a pistol and indicating an intention to shoot, the latter is justified by the rule of self-defense in shooting, even to death; and that such justification is not avoided

> by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defense does not rest on the actual, but on the apparent facts and the honesty of belief in danger.

Grafton's act was without malice as a soldier in the performance of his duty.

GRAFTON WAS A UNITED STATES OFFICER.

The plaintiff should have been acquitted, because at the time of the occurrence he was acting as a federal agent, and the shots were fired in the performance of his duty. This point of plaintiff's defense, which seems to be unanswerable, was completely ignored by the court below, which held that a sentinel is governed in the performance of his duty by the ordinary rules of self-defense as applied to private persons acting in self-defense. We cannot think that such a theory of law, in utter conflict with the authorities, can be affirmed here, but on the contrary, we believe that it will he held here, in accordance with the precedents, that an act done by an officer or agent of the United States, acting under the Constitution and laws of the United States, in the performance of federal duty, is free from criminality; and that such act is justifiable, even though a mistake of judgment is made; provided the officer honestly believes that he is performing his duty. In this connection attention is invited to the following cases: *United States vs. Clark*, 31

Fed. Rep. 710; *In re Neagle*, 39 Fed. Rep. 833; *Cunningham vs. Neagle*, 136 U. S. 1.

In Clark's case, *supra*, Mr. Justice Brown, said:

> In charging the jury in *U. S. vs. Carr*, 1 Woods, 484, (Fed. Cases No. 14732), Mr. Justice Woods instructed them to "inquire whether, at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into a mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful * * * But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

Mr. Justice Woodbury in *Wilkes vs. Dinsman*, 7 How. 89, in the opinion at page 130, said:

> The officer being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner

> not confided to him, as with malice, cruelty, or willful oppression, or in the words of Lord Mansfield in *Wall vs. McNamara*, that he exercised it as if "the heart is wrong" (2 *Carr. & Payne*, 158, note). In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error.

And to again quote from the opinion in the Clark case, *supra*:

> I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or, in the words used in the above case, were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice. As there is no reason in this case to suppose that Clark was not doing what he conceived to be his duty, and the act was not so clearly illegal that a reasonable man might not suppose it to be legal,—indeed, I incline to the opinion that it was legal,—and as there was an entire absence of malice, I think he ought to be discharged.

In Clark's case the sentinel had fired upon and killed an escaping prisoner.

In *Cunningham vs. Neagle*, 136 U. S. 1, it being born in mind that Neagle was acting as a federal officer, whose duty it was to guard the person of Mr. Justice Field,—Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States, held:

> The result at which we have arrived upon this examination is, that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justifiable in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

In Neagle's case, Terry, who had struck Mr. Justice Field, had drawn no weapon, and in fact was unarmed at the time when he was killed, but it was held that Neagle was well within the limits of his authority in killing his assailant, if he believed that the life of Justice Field was endangered.

The law of Spain is analogous to that of the United States on this point, for we find it so stated in a case quoted in the "Codigo Penal of Niada,"

Vol. 1, page 133:

> *Question XIV.* When from the record it appears that, by order of the "Teniente Alcalde" of the town, a sworn guard (el guarde jurado) was escorting (acompananado) various persons (sujetos') to the house of the "Alcade" to report to him certain punishable acts that had occurred that night, and that upon passing in front of a tavern, a voice was heard proceeding from a group of persons that were near said tavern, saying "Disarm the Guard", and said group of persons came towards the guard; and that the guard cried out "Halt." which command was not obeyed by said group; and that, on the contrary, they persisted (insistieron) in their purpose (idea); and that seeing this the guard fired one shot at them at a distance of ten or twelve paces wounding three of them in the legs, as a result of which one died, and the other two having been cured before the expiration of ninety days without impediment or deformity resulting therefrom; and given the *illegal aggression* offered the guard and the *want of provocation* on his part, should it be held that there was *reasonable necessity for the means employed to repel said aggression,* and should therefore (the guard) be declared *totally exempt from responsibility* for the same?

The criminal division of the Audencia of Tarragona did not so understand it, for though it acknowledged the presence of the two first requisites in the act, they did not acknowledge the presence of the third; and it accordingly sentenced the accused to six years of "prision correcional." The accused appealed from said sentence, basing his appeal on an infraction of Art. 8, No. 4, of the Code, and the Supreme Court declared him free of all criminal responsibility on the following grounds:

When the trial court acknowledged that the guard Calvet was assaulted by *illegal aggression*, without having *provoked* the *event* even from those who attacked him, in view of the circumstances prior to and contemporaneous with the occurrence, the shot fired with the intent of impeding the proclaimed purpose of his assailants was in every way justifiable, for his character as agent of the laws (autoridad) imposed upon him the obligation to exact respect, and authorized him to repel with the arm placed in his hands for that purpose collective and offensive acts when he saw that his prudent admonition was unheeded both by words and by the persistent attitude of the persons against whom he employed his legal means of defense:

"And whereas, said trial court not having so held, violated No. 4, of Art. 8, of the Penal Code, etc." (Sentence rendered December 18th, 1883, published in the "Gaceta" on March 20th, 1884.)

The court below found that Grafton acted without malice and in good faith, in the honest belief that he was being attacked; and we believe that there can be no doubt in the minds of any member of the court upon this point.

He had been posted to guard the garrison and the property of the United States, and he was there as the representative of the dignity and sovereignty of the United States. An attack upon the sentry was an attack upon the United States and it was his duty to repel any such attack with the arms furnished him for that purpose. But, it is asked, why were not the natives halted before being fired upon? Why? For two very simple reasons. There were no orders for halting persons passing along that road-way in the day time. Hence the sentinel moved out of their way that they might pass in peace; and when he became aware of their deadly intent it was too late for halting. The supreme moment had come—the moment for the performance of duty—the moment for action. Thus it seemed to the plaintiff, and it is respectfully submitted his belief was reasonable.

Plaintiff's action should be judged in the light of the circumstances as they appeared to him at the time. This sober, prudent, steady, and trained soldier, confronting his assailants, was the best judge as to the necessity of his action.

The language of Judge Sawyer, *In re* Neagle, 39 Fed. Rep. 833, is particularly applicable to the plaintiff's case in this respect.

In arriving at his conclusion as to the necessity of Neagle's action, he said:

> But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time, when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. * * *
>
> To such, the proper time would never come. Neagle, on the scene of action, facing the party making a murderous assault, knowing, by personal experience, his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms; his readiness to use them, and his angry, murderous threats; and seeing his demoniac looks, his stealthy assault upon Justice Field, from behind, and, remembering the sacred trust committed to his charge, —Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come; and if he honestly acted, with reasonable judgment and discretion the law justifies him, even if he erred.

So we ask the court to hold in this case that, if the plaintiff acted honestly, without malice, and with reasonable judgment in the performance of

his duty, the law justifies him, "*even if he erred.*"

In this connection, it is submitted that it is proper for the court to give consideration to the acquittal of the plaintiff by the court-martial; for, by that acquittal, is shown the opinion of thirteen officers of long service and training in the military establishment as to the reasonableness of plaintiff's action. It is as much as to say that each of these experienced officers, under similar circumstances, would have acted as did the plaintiff.

In this sense, it is thought not improper to ask the court to attach some weight to the judgment of the military court in passing upon the reasonableness of plaintiff's action. As was remarked by Judge Brown in *U. S. vs. Clark*, 31 Fed. Rep. 710:

> At the same time, I think that weight should be given, and in a case of this kind great weight, to the finding, as an expression of the opinion of the military court of the magnitude of Stone's offense, and of the necessity of using a musket to prevent his escape. I am the more impressed with this view from the difficulty of applying common law principles to a case of this description. There is a singular and almost total absence of authority upon the subject of the power of a military guard in time of peace.
>
> But considering the nature of military government, and the necessity of maintaining good order and discipline

> in a camp, I should be loth to say that life might not be taken in suppressing conduct prejudicial to such discipline.

It has been said, however, that the natives only intended to make sport of and to frighten the sentinel by their demonstration with the bolo. It is difficult to believe that this court will give the stamp of its approval to the idea that a sentinel of the United States Army may be made sport of by any one, and least of all in that territory, still rife with ladronism and pulajanism, which are the foster parents of insurrection.

We have been taught to believe the person of a sentinel sacred, that he walks his post clothed with all the authority and power of the Sovereign, entitled to the respect of all, and that no person, high or low, may show him disrespect or "make sport of him."

In the words of Judge-Advocate General Holt, which have been followed for forty years:

> Respect for the person and office of a sentinel is as strictly enjoined by military law as that required to be paid to an officer. As it is expressed in the Army Regulations, "all persons of whatever rank in the service are required to observe respect toward sentinels." Invested, as the private soldier frequently is while on his post, with a grave responsibility, it is proper that he should be fully protected in the discharge of his duty. To permit any one of whatever rank,

> to molest or interfere with him while thus employed, without becoming liable to a severe penalty, would obviously establish a precedent highly prejudicial to the interests of the service.

Those, therefore, who undertake to molest sentinels do so at their own risk, and abide by the just consequences of their temerity. Consequently, even if the two natives were only "making sport" of the plaintiff, his action was both reasonable and justifiable, and should justify him before the law.

CONCLUSION.

In conclusion we would summarize briefly:

JEOPARDY.

Our contention of jeopardy rests on the following:

1. On both the Federal Constitution and the Philippine Penal Act.

2. The 62d Article of War gives to courts-martial jurisdiction of crimes that are less than capital.

3. Manslaughter is not a capital crime.

4. Courts-martial have jurisdiction of crimes that are also military offenses.

5. The shooting of a man by a sentinel, if a crime at all, is certainly a military offense.

6. The doctrine that one act may offend two sovereigns and hence may result in two lawful trials, cannot here apply, because there was here but a single sovereign, the United States; and indeed both prosecutions were in the name of the United States.

7. The act for which Grafton was tried was the same in both cases.

8. The situation is not changed by the fact that in one indictment the charge was manslaughter and in the other, assassination.

9. By the court-martial it was found that he was not guilty of the crime of manslaughter in killing Felix Villanueva.

10. Manslaughter is not murder, but every ingredient of the crime of manslaughter is necessary to constitute the crime of murder. If guilty of murder he was guilty of all the things that constitute the crime of manslaughter and something more.

11. Having been acquitted by the court-martial he was adjudged by a court of competent jurisdiction to be innocent of certain things (the things involved in manslaughter) of which he must be guilty, before he can lawfully be found guilty of the crime of murder.

RIGHT TO JURY TRIAL.

When tried by any court other than a court-martial a soldier who is also a citizen of the United States, is entitled to a trial by jury.

1. If a resident within the United States, he, without question, is entitled to a jury under the Constitution.

2. When he enlisted, to uphold the Constitution, he lost no right under it, save the single one he voluntarily surrendered, to-wit: a jury trial when tried by a court-martial.

3. He was a citizen before he was a soldier and in becoming a soldier only lost the one right above named.

4. He did not go to the Philippine Islands of his own volition, but by the orders of the authorities over him, who must act under the Constitution.

5. The power given to those authorities is no greater and no more perfect than the rights that the same Constitution gave to Grafton.

6. Grafton had no right under the Constitution to disobey the orders of his superior officers; and those officers had no right under the Constitution to compel him to go where he would be deprived of his privileges under the Constitution.

7. Wherever he went by virtue of Constitutionally authorized orders he was under the pro-

tection of the Government resting on that Constitution, and was entitled to every privilege (not voluntarily surrendered) that belonged to any citizen of the United States, wherever that citizen might be.

8. If in a foreign country as a result of such orders, and acting thereunder, it was his government's duty to protect him in every right that was his when he was ordered to that foreign country.

9. The doctrine of exterritoriality shows that international law recognizes the soundness of this principle.

10. The duties of the Government and the citizen are reciprocal; the citizen obeys; the Government protects; and it fails of its duty if its protection does not secure to the citizen every right belonging to him.

11. It is conceded that under the Constitution the United States Government has the power to acquire territory, by conquest or purchase. Upon the acquisition of such territory and of dominion over it, it may be conceded, that the Government can determine the status of those persons who were inhabitants of that territory prior to its acquisition and remain such after. And the reason for this lies in the fact that Article IV of the Constitution provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory

or other property belonging to the United States." This is a recognition of a governmental fact which must have been recognized even without express constitutional declaration. For, conceding that the United States is a sovereign, we must accord to it all the attributes of sovereignty, and one of these is the power to make war, and, the acquisition of territory by conquest may always be an incident of war. But after such territory has been acquired, even though the inhabitants thereof are *not* citizens of the United States and are not accorded any of those rights which the Constitution guarantees to the citizens of this nation, can it be said, even though all this be so, that this acquisition of territory can change the status of a *man who was a citizen of the United States before* the acquisition took place? Of course the answer to that question must be: "No." That being so, Grafton was, if nothing else, a citizen of the United States dwelling in a territory whose native inhabitants were not entitled to any constitutional rights, if you please, but a territory that was ruled over and governed by the Government of the United States, whose government springs from and rests upon this very Constitution. Now can it be that the United States Government, prohibited by the instrument that gives it birth from denying any of its citizens a trial by jury, is able to deprive the citizen of that constitutional right in one place, over which that government had absolute dominion, though it cannotin another? It might be conceded that our government could refuse to give what non-citizen

subjects never had; but that is quiet a different thing from taking from a citizen of the United States a right that is his, given and guaranteed by the Constitution, simply because he chances to be in the back room of the nation's mansion instead of the parlor.

It must be borne in mind that the denial of this right of a trial by jury came from a tribunal erected by the United States Government. If this right is taken from him it is taken from him by an instrumentality of the United States Government, and so by the United States Government itself. And then what have we? We have a government existing by virtue of the Constitution, limited by the Constitution, one of which limitations is that a citizen of the United States shall not be deprived of a trial by jury and the courts saying of that government: "In some places, it must observe the limitations placed upon it by the instrument by which alone it lives, but in other places it need not; that the simplest of English phrasing means one thing by the shores of the Atlantic and another in the far-off islands of the sea."

Again: Article I of the Constitution, in enumerating the powers of Congress, declares that "Congress shall have power * * * To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States * * "

The District of Columbia is such territory. Could there be given more complete power than is given to Congress with relation to the District of Columbia? Can it be thought for one moment that this full and ample grant of power is less than that given by that other clause: "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory belonging to the the United States"? This last clause, it must be remembered, is the sole authority for the present Philippine government. And yet, who would have the hardihood to say that Congress has the power to erect within the shadow of this capital, a Court of First Instance, and clothe it with the power to try men for capital and other infamous crimes without the intervention or presence of a jury? The question carries its answer with it. And yet the words of this immortal instrument on the lips of a representative of the United States Government, and above all upon the lips of its judiciary must mean the same whether they be spoken where shines the pale Pole-star or where shimmers the Southern cross.

EXTERRITORIALITY.

This doctrine is basic in international law. An Army in a foreign country can yield obedience to no authority save that of its own officers. Any other rule would make impossible the preservation of the army's integrity. If the foreign government may arrest one soldier, it can arrest every soldier in the army, and thus the army be disbanded.

If the army is in a hostile country it surely owes no duty to the government of such country. If the army is in a friendly country, its government will not and cannot ask the army's commander to yield up his soldiers to such country's government.

The Philippine Islands are either domestic or foreign territory. If domestic the Constitution attaches. If foreign it is either a friendly or a hostile country. If hostile the army owes no duty to its government. If a friendly foreign country its government violated fundamental international law in attempting to exercise criminal jurisdiction over a soldier in our army.

If it was neither foreign nor domestic territory, but a no-man's land, the army marching under the authority of the Constitution bore with it, for the benefit of every citizen soldier composing that army, every right which belonged to each citizen soldier when the march began.

MERITS.

The De La Rama case, 201 U. S. 303 (s. c. 50 L. Ed. 765), makes it proper for, and the gravity of this case makes it the duty of, this Court to examine the facts in this case.

And in the event that case should be deemed not authority for an examination of the facts it is respectfully submitted that an examination of them is wise to this end: That if it is made

manifest that a grievous wrong has been committed that fact is bound to and should weigh with the court in passing upon the closely controverted points of law.

And when examined they disclose:

1st. That Grafton had seen the horrors of Samar where thirty or forty American soldiers had been surprised, rushed and slaughtered by bolomen, and their bodies subjected to unprintable mutilation.

2d. That he was apprehensive of danger and that such apprehension was well founded:

a. On the foregoing.

b. The known tendencies of the natives.

c. The women leaving the village in boats.

d. The return of the boats filled with men; *the very thing that would happen if hostilities were contemplated.*

e. The sullen aspect of the natives.

f. He was part of a small detachment of twenty-odd men two and a half miles from the main body of troops.

3d. The close proximity of the bolo and the body of the man who carried it to the sentinel, show how real the danger was.

4th. The two shots were the result of a single mental impulse occasioned by well founded fears and the murderous assault.

How could Grafton know that Villanueva was unarmed? He rushed forward with the other bolo man and only jumped back when the other had been shot.

5th. Grafton could not know but that many natives were concealed behind the ware-houses and the thickets close by.

6th. The two natives whose evidence was given as the foundation for conviction, were contradicted by every white witness, disbelieved by the Court as to the number of shots fired, and the evidence further shows that ten days after the trouble they said that they knew nothing about the matter, about which three months later they testified. Credibility's self, unwarped, would not have believed them.

Such a judgment could never have passed uncondemned in our wholesome American atmosphere.

Can it be that distance can so refract the rays of justice that such a judicial distortion can become a sanctioned fact.

Can it be that the power of this central body of our judicial system to enforce recognition of its doctrines, diminishes as the square of the distance increases?

We respectfully submit the judgment should be reversed and the prisoner discharged.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 358.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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JURISDICTION.

The Court of First Instance of the Province of Iloilo had no jurisdiction to try the defendant for the offense with which he was charged, because the authority of that court rests wholly upon statute, and by that statute it is precluded from exercising jurisdiction over the place where Grafton was when he acted.

The offense was committed upon a reservation or tract of land in the Philippine Islands "designated by the President for military" purposes. Being so designated, it was excluded from the sweep of the statute giving jurisdiction

to courts of this class by the following language (section 12 of the act of July 1, 1902):

> "That all the property and *rights* which may have been acquired in the Philippine Islands by the United States under the treaty of peace with Spain, signed December 10, 1898, *except such land or other property as shall be designated by the President of the United States for military* and other reservations of the Government of the United States, are hereby placed under the control of the government of said islands, to be administered for the benefit of the inhabitants thereof, except as provided by this act."

Camp Jossman was designated by the President as a military reservation on September 1, 1903, and so is such a tract of land as was in contemplation of the statute-making power when it used the terms "such land * * * as shall be designated by the President," &c.

Thus it is seen that Camp Jossman, the place where the act complained of is alleged to have been unlawfully done by Grafton, is in express terms placed beyond the jurisdiction of the Court of First Instance.

The question of jurisdiction thus presented is raised by the plea to the jurisdiction of the Court of First Instance, which was interposed in that court in the following language:

> "The Court of First Instance has no jurisdiction to try the accused for the offense alleged in the indictment, for that the act constituting the alleged offense was done and committed within the limits of Camp Jossman, a military reservation of the United States, and by a soldier duly enlisted in the Army of the United States, in the line of duty" (R., 2).

In passing upon this plea to the jurisdiction, the Court of First Instance made the following statement of facts and conclusion of law:

> "*The Statement of the Facts:* First I shall find to the effect that the defendant was a soldier; that he was on duty at the time that this offense occurred, and that the point where he was on duty and where the offense occurred was within a military reservation in Guimaras. * * *
>
> "I think the first plea to the jurisdiction of the court must, necessarily, be overruled; that is, the substance of the demurrer that this court has not jurisdiction—that is, a general challenge of the jurisdiction of the court. It is coupled with the proposition that this man was a soldier, and was on duty in the military reservation; but I think under the authorities that have been cited, and under the law that has been passed by Congress constituting this court, that it has the same jurisdiction in matters of this kind that the Federal courts at home have over offenses committed upon a military reservation" (R., 7 and 8).

An exception to this ruling was preserved of record as follows:

> "Captain Nettles asks that the matter of jurisdiction of this court be carried to a higher court before the accused pleads to the merits of the case."

and was disposed of as follows:

> "The COURT: The motion made by Captain Nettles is overruled, and the defendant is ordered to plead. The motion is overruled as a matter of law, not as a matter of discretion. It is the opinion of this court that this case must be finished by final judgment before any part can go to the Supreme Court under the new method of procedure. Of course it will not be necessary for it to go at all, if the defendant is acquitted" (R., 12).

The point was still further preserved of record for consideration by the Supreme Court of the Philippine Islands by the following assignment of error:

"1. The court erred in overruling the demurrer and denial of jurisdiction by the defendant for that:
(*a*) The Court of First Instance has no jurisdiction over offenses committed by officers or enlisted men of the United States army within the limits of a military reservation of the United States" (R., 90).

Authorities cited tending to uphold the jurisdiction of civil tribunals within the confines of the United States proper over offenses committed upon military reservations have no bearing here, because, while it may be conceded that civil tribunals within the United States maintain jurisdiction over civil offenses committed upon military reservations, it is to be remembered that such reservations have been carved out of territory which prior to the establishment of the reservation had been subject to such jurisdiction. In the act of July 1, 1902, establishing a civil government in and for the Philippine Islands, express reservation of jurisdiction with respect to offenses committed upon military reservations was made.

A Constitutional Tribunal for the American Soldier.

Conceding that the Dorr case 195 U. S., 138, establishes the law to be that Congress has the power to fix the status of all people who are the inhabitants of territory acquired by the United States Government before that territory is incorporated into the Union, and that such power has been exercised by Congress with relation to the people of the Philippine Islands, let us hope that the dissenting opinion in the Dorr case does not truly prophesy the all-time attitude of this court; it is suggested that the result of that opinion is bound to be to take from every American soldier who is in the Philippines his right to a jury trial although he is there as a result of orders that he was compelled to obey and not as a result of his own voluntary act. The insistence, by the Government, that a different rule must be

applied to an American citizen-soldier when in the Philippines to that which must be applied to him while in any other part of the nation's dominion seems to be a result that flows from the Government's shrinking from the logic of the situation that actually exists. It is indeed "a condition and not a theory" that confronts us. Despite our desire for the establishment of governmental institutions before which all men shall be equal, the fact remains that the executive portion of the Government, as well as the judicial, recognizes that the people of the Philippine Islands do not possess those characteristics of mind and morals that make it wise to accord to them all the rights that the Constitution gives and guarantees to the American citizen. As was said by Mr. Justice Day in the Dorr case, 195 U. S., 137-148:

> "And while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined" (Cooley, Principles of Const. Law, 164).

And again:

> "The people [of the Philippines] * * * coerced to accept, in advance of incorporation into the United States, a system of trial *unknown to them and unsuited to their needs.*"

This utterance of this court is susceptible of but one interpretation, namely, that we recognize the fact to be that the Filipino is not possessed of those things necessary to be possessed in order to put a man upon an equality with the average American citizen. From that we must draw the conclusion inevitably that the Filipino is recognized as an inferior race; that the arbitrament of arms proclaimed not only his inferiority in the field, but in every aspect of civil life that has bearing upon government. Now this fact, existing though it does, and by indirection at least recognized by

the courts, should not be employed as an excuse or justification for depriving an American citizen of *his* constitutional privileges. You do not give to the Filipino a jury trial; you establish for him instead of the *nisi prius* court of the common law a Court of First Instance; not because the jury trial is not in itself good, a wholesome judicial institution, the "bulwark of Anglo-Saxton liberty," but because it is an aspect of government for which the Filipino is not fitted, and for no other reason. But the unfitness of the Filipino for the exercise of this privilege does not in any degree diminish the ability of the American citizen to exercise it; and yet if the Government's contention in this regard is to be upheld it must be upheld upon a chain of reasoning like this:

1st. We can give or withhold from the people of the Philippines jury trial.

2d. The Filipino is not fitted to enjoy the privilege of a jury trial.

3d. For this reason we will withhold from him the right of jury trial.

4th. The American citizen *is* entitled, under the Constitution, to a jury trial;

5th. But in the Philippines we will take it from him:

(*a*) Not because he is not an American citizen,

(*b*) Not because he isn't as fitted when in the Philippines to enjoy that privilege as when in the States,

(*c*) Not because it is not the duty of the Government, under the Constitution, to protect every American citizen in his constitutional rights;

(*d*) But because the Filipinos are not fit for it; and for that reason we will not let the American citizen enjoy this right while he is in the Philippines.

If we must have absolute equality before the courts established by the United States Government in the Philippines, is it not better to *level up,* so that the Filipinos shall have a jury trial, even if you doubt his capacity for a proper exercise of that right, rather than *level down,* by taking from the American citizens their constitutional rights, in order to bring them down to the level of the admittedly inferior Filipino. Why not frankly recognize what the Spanish war and the Treaty of Paris have made plain, that there is in the Philippines two races, the dominant and the subject race; that the dominant American, being within the dominion of the United States Government, carries with him to every place where the United States Government, in its civil aspect, controls, certain constitutional rights; one of which is the right of a trial by jury when charged with a felony, in any court erected by the United States Government, which acts only under that Constitution that gives to the citizen this privilege; and in the fulfillment of the Government's constitutional duty in this particular it should make provision for a trial by jury whenever, in such a court, he is charged with an infamous crime. Conditions compel such a situation if the Government would not shirk its duty to its own citizens. Just as the Roman citizens stood on a different footing before the law from the inhabitants of a conquered province, so does the American soldier stationed in the Philippines stand on a different footing from the people of those islands, because the logic of events compels it. Let this fact be admitted and judicially proclaimed, not with a view of being tyrannical, oppressive, or other than kind, but because it is true. Let us see that the Filipino is protected in all those civil rights to which all peoples are entitled: He shall not have taken from him his property or his liberty without due process of law; he shall not be compelled to testify against himself; he shall be privileged to testify in his own behalf when charged with crime, if he chooses; he shall have a speedy

and public trial; charges against him shall be fairly made known to him; but recognizing his inadaptability for the exercise of the right of a trial by jury, we will abstain from giving him that which might prove a bane rather than a blessing. But side by side with this ward of the Government are citizens whose rights are fixed by the very instrument that creates and places limitations on that Government; and among those rights is the right to a jury trial; that cannot be taken from them, even though it is impossible to give the same right to their Filipino neighbor. For years, in England, where the common law was born, the ecclesiastic was tried in another court than that which took cognizance of the layman's offense; and the nobleman could only be tried by the House of Lords or the Court of the Lord High Stewart, for there alone were his peers. So it is seen that such things are not strange to Anglo-Saxon jurisprudence. It is true, that it is the hope of those who love republican institutions and democratic equality, that the promulgation of the Declaration of Independence, that all men are equal, shall some time come to be an admitted fact as well as an exalted political hope. But when dealing with Visayans, Tagalogs, Bicols, Iloconos, Pangasinans, Pampangas, and Cagayans to say nothing of the Mohammedan Moros and the Pagan Igorrotes and Negritos of the Philippine Islands, such a thought is but an "iridescent dream;" and to attempt to enact laws in the Senate House or to mould them in the courts, upon the hypothesis of such equality, is to be academic, perhaps, but certainly not practical. But while all this is so, the constitutional rights of the citizens remain the same; and with regard to those rights and the citizens' relation to them, there is no room in the mind of a wise statesman or righteous judge for debate or argument. Wherever the Government is in power, its duties to the citizens must be performed, and its power in the Philippines is as perfect as it is in the District of Columbia.

It has been said that the right to a trial by jury is a constitutional right, but not a *"fundamental"* constitutional right—that it appertained to procedure and so could be ignored, while other constitutional mandates must be observed. It is respectfully suggested that since this provision for jury trial is a part of the fundamental instrument, the Constitution, it is bound to partake of the characteristics of that instrument, and is fundamental. Are not all parts of the fundamental—the foundation document—fundamental? The root word, from which the adjective comes—*fundus*—means nothing but foundation. The Constitution is the foundation on which the Federal Government rests; and can we say of a part of that foundation, it is not fundamental? One part might seem more important than another, but it is all foundation; it is all fundamental.

The decalogue is the foundation of our religion. What would be thought of the clergyman who taught that the commandment which forbids us to bear false witness against our neighbor only appertained to procedure, and so was not fundamental moral law, and could be disregarded when expediency demanded it without violating ethical proprieties?

Power and Duty.

The duty of the sovereign is coextensive with its power, to accord to the subject or citizen all things that the law of the sovereign gives to the subject or citizen. The United States Government is in supreme control of the Philippine Islands. Those islands are appurtenant to but outside of the United States. The dominion, however, of the United States within them is complete. Just such places as were contemplated by the Constitution makers when they provided that "the trial of all crimes except in cases of impeachment shall be by jury; and such trials shall be held in the State where the said crimes shall have been committed; *but when not com-*

mitted within any State, the trial shall be at ch place or places as the Congress may by law have direc d" (section 2, article III, Constitution of the United States)

The foregoing makes perfectly clear that tl makers of the Constitution had in mind the thought tha a citizen of the United States might be charged with commi ng a crime at some place over which the United States overnment had dominion, but which was outside any State nd accordingly made the foregoing provision. The care with which the right of trial by jury, for the citizen of the U ited States, was guarded by the Constitution makers, and th people who were behind the Constitution makers, is made ear by the foregoing quotation, and also by the sixth an ndment to the Constitution, subsequently adopted. Ther is nothing contained in the reports or opinions of this cou in conflict with the proposition, that it is the duty of the U ited States, wherever it has the power to do so, to see that its izen, when charged with a felony in one of its own courts, all have a jury trial.

Conceding that Congress has power to fix t status of peoples who *never were citizens* of the Unite States and never had any rights as such, no power found in he Federal Government can take from a citizen of the Unite States that which is his birthright, given him by a power ich is behind all Federal government, to wit, the Constitu on.

The Hurtado case (10 U. S., 516) has no b ring upon this proposition, since that is but the recognition the rights of an independent sovereign, to wit, the State o California, to determine its own criminal procedure. T Maxwell case (176 U. S., 581) is a case of the same i ort. The Mankichi case (190 U. S., 197) has no bearing, Mankichi was a citizen of Japan. The Dorr case (195 S., 138) contains in the controlling opinion nothing i icative of hostility to this position, as nowhere in the re rd or the

opinion does it appear whether Dorr was or was not a citizen of the United States, and no position taken by the court was made to turn upon that question.

The case of *in re* Ross (140 U. S., 453), much relied upon by the Government, is without avail as against this contention; because that was a case involving things transpiring and actions by the Government performed in a place beyond the jurisdiction of the United States. It was in Japan. Without the rights given by treaty, an offense against the laws of Japan, if done by an American or another, must have been punished by the laws of Japan. Since the punishing of American citizens or the trying of them, according to the jurisprudence of many foreign countries, would work enormous hardship, such an evil was attempted to be in a measure cured by treaty. The treaty with Japan simply provided that if an American citizen should violate the laws of Japan, he should be tried *in Japan* by a tribunal created by the United States. Under the treaty the United States Government had no right to take the offender outside of Japanese dominion, for if such things were permitted, the government of Japan would never know whether the infractors of its laws, when Americans, were ever punished. They had to be tried in Japan, and with such instrumentalities as were there at hand. As was suggested by this court in that case, the material for an American jury was not available, and consequently the consular court was the best that could be had. It was never thought that the consular court was a fulfillment of a governmental duty to the citizen in a place where the Government had *supreme control;* but it was the best the Government could do in a place where its power was *not* supreme; and the accused's condition was very much better than it was prior to the making of such treaty and the creation of such court. So the Ross case does not in any degree militate against the proposition that where the power of the United States is *complete,* there is its *duty* to its citizens, in ITS OWN

COURTS, when the citizen is charged *with felony,* to see that he has a JURY TRIAL.

Can He Waive His Constitutional Right?

It has been suggested that Grafton, when he enlisted, enlisted with a knowledge of the fact that the law was that in the Philippine Islands, where he might be ordered to go, he could not have a jury trial, if there he was charged with crime; and thus he waived his right to a jury trial while in those islands. We presume that, theoretically, he was supposed to know the law as it was subsequently proclaimed to be in the Dorr case; though it seems a rather violent presumption, in the light of the fact that the members of this court differed so radically on the questions involved in that case; and in the light of the surprise that that adjudication occasioned to many members of the profession admittedly learned. But let us assume that he did know it. The most that can be said is that he waived his right to a jury trial. But this is a thing he cannot do when charged with a felony, as in this case he was. The following authorities are demonstrative of the fact that when charged with felony and arraigned in a Federal court a man who is a citizen of the United States cannot, under the United States Constitution, waive a trial by jury. Now if he cannot waive it when charged and arraigned, is it not approximating the absurd to say: "Yes, that is so; but then he can waive it before he is charged or arraigned"? If he cannot waive it, he cannot waive it; and that he cannot is demonstrated by the authorities here following:

> "It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say *that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury*

of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons."

Thompson *vs.* Utah, 170 U. S., 343, at 353-354; Book 42 L. C. P., p. 1067.

"In a criminal case the court cannot direct a verdict of guilty even where the facts are admitted beyond dispute, and the question of guilt or innocence depends wholly upon a question of law which the court must determine."

U. S. *vs.* Taylor, 11 Fed., 470.

Another thought: This is a question of statecraft as well as law. This court must interpret the law with the mind of the enlightened statesman as well as that of the analytical lawyer. The results that are likely to flow from the conclusions reached by this tribunal must be considered. And with that duty before the minds of the justices, will they not think of the effect upon the army that an upholding of the Government's contention is bound to have? Uphold it, and you say to the soldier, A sentence of penal servitude may come to you at the hands of a court some members of which are natives, whose every prejudice, racial and religious, cries out against the man with the magazine rifle, who is the alien master of his country, the foreign ruler of his people. If we surrender our soldiers, whose bayonets alone prop our insular government, to the soldiers' enemies to pronounce judgment upon them, will not contempt for us strangle even wonder in the mind of that enemy? For the Government to offer up the soldier whose sword alone guards it in the Orient as a peace offering to the Filipino is a thing as unjust as it is unwise, the thought of which revolts the judicial conscience. What will be the effect upon the morale of the army? What will become of that resourcefulness, that daring, that soldierly hardihood that has characterized the

American army, if the soldier, while contending with the natives, is obliged to constantly think of his probable betrayal by his own Government? Let the Government placate the Filipino, but do not let it pander to him. If this judgment is permitted to stand, the draft will have to be resorted to to fill the ranks of our army, small as it is. It has been estimated by experienced officers that the effect of this case has already been to prevent the re-enlistment of more than a thousand of the army's best soldiers. The ingratitude of republics is proverbial; but to permit the thing here sought by the Government is to pile the Pelion of thanklessness upon the Ossa of ingratitude with a vengeance. This practical aspect of the matter makes plain that this is a case similar to those Wendell Phillips had in mind when, speaking of the Great Judge, he said: "He saw to it that justice should always be the highest expediency."

Exterritoriality.

Under the Insular cases and the Dorr case and the executive practices with relation thereto, the Philippines are foreign territory, for revenue purposes.

Can it be that it will be held that this territory is foreign in order to accommodate a fiscal convenience, and be held to be *not* foreign in order to take from the citizen-soldier the protection that is his in a foreign land, under the doctrine of exterritoriality?

Let us not forget that he is there on exactly the same mission now that was his, immediately after the battle of Manila, to wit, to keep in subjection the people of the islands and to uphold the sovereignty of the United States. It was then international war; it is now insurrectionary war. But, so far as the larger part of the inhabitants is concerned, it was an enemy's country then and is an enemy's country now.

To hold that the islands are foreign for purposes of finance

and yet not foreign so that it is necessary to deliver the American soldier, a citizen of the United States, naked to his enemies is indeed to pass by the door of the temple of Justice to lay offerings upon the altar of Expediency.

Jury Trial for the Soldier is Practicable in the Philippines.

And the practical working out of the idea of an American jury for the American citizen when in the Philippines need not give us pause. The whole archipelago could be made a single judicial district for this purpose. All might go up to Manila in matters of this kind, as once all England went up to Westminster Hall in matters of Chancery. And there will always be enough Americans in the islands, while our rule obtains, to furnish a jury of his peers for the American prisoner; or what would perhaps be better still, as the existing law of the United States declares that the trial of persons who have committed crimes elsewhere than within a State or an organized judicial district shall be had in the district where the accused shall be found or shall be first brought, why should not our citizens, when charged with felonies alleged to have been committed in the Philippines, be brought to the nearest organized judicial district of the United States, to be there tried in conformity with the constitution?

Unfairness to the Soldier.

But suppose the Government does possess the power to deprive the citizen, whom it has compelled to go to the Philippines, of the right of a jury trial, or that the citizen could waive it, or both; think of the abandon unfairness of sending an American citizen as a soldier to the Philippines for the sole purpose of holding the conquered races in subjection—to suppress insurrection, to be the natives' military

master, and thus compel him to breed for himself in the natives' breasts, hatred and all uncharitableness—and then, when by any misadventure he comes in conflict with these natives, even in the discharge of a military duty, to turn him over to the tender mercies of courts presided over in part by judges who are natives and so his enemies. That this enmity exists will not be questioned by the candid man. Not by the fawner upon power that place may be his—who forgets the conqueror and sees only the patron—can we judge of Filipino feeling; but rather by such horrors as that of Balengigi in Samar, where soldiers' corpses were mutilated unspeakably by the bolo-wielding butchers.

If we are to have a satrapy in the islands, let us not distinguish our satrapy from those of Persia by throwing the soldier, by whom alone that satrapy is made possible, to the boloman or the boloman's judge, as the Russian mother threw her child to the pursuing wolves. She did it to save her life; we can have no better excuse for doing it than to maintain a pleasing political fiction, viz, that Peace sits enthroned in the archipelago, and that the twelve or fifteen thousand soldiers there are there only as a guard of honor, and that to the Mestizo and Tegalo judge the American soldier looks the same as his own brown brother.

Second Jeopardy.

If unhappily the court should conclude that the proposition with respect to the jurisdiction or want of it on the part of the courts of the Philippine Islands to try the accused, by reason of the fact that the offense was committed within the limits of a military reservation, is not sound; and also that the contention with respect to the right of a citizen charged with crime in the Philippines, at the instance of the United States, to be tried by a jury of his peers is also unsound, then it is submitted with confidence that Grafton's plea of immunity from trial before the Court of First Instance by reason of the provision of the Philippine Bill of

Rights (act of July 1, 1902, sec. 5, par. 3), to the effect that "no person for the same offense shall be twice put in jeopardy of punishment," affords incontrovertible ground for reversal of the judgment here complained of.

Meaning of the Judgment.

Let us see what the upholding of this judgment means: It means that an American citizen was induced to enlist in the Army of the United States with the belief that in so doing he was surrendering only one constitutional right, to wit, a trial by jury when before a court-martial. Fine-spun theories may be advanced to establish the legal fiction that he knew differently, but we do not think a candid man will seriously argue that Grafton did not, at the time of his enlistment, suppose that wherever he went he was under the protection of the Government he served and would not be deprived of a jury when charged with felony in any civil court created by his Government.

Having enlisted with this belief, the Government then issues orders compelling him to go to the Philippine Islands. It is a place to which he had no desire to go; where, for a soldier, there was only hardships, enemies, disease, and possible death; but he was obliged to go or be branded as a deserter or imprisoned for insubordination. Being a good citizen and a good soldier, he obeys these orders and goes to the Philippines; he was at Balangigi, in Samar, where forty or fifty of his fellow-soldiers were slain by bolomen and their corpses hacked and mutilated and outraged in a manner that the telling of it would so violate the rules of decency and this court's decorum that the same cannot be here printed. Such a sight would be bound to impress itself upon his mind, and when dealing with natives himself he would do so with recollections that made perfectly clear to him that to take chances of being overpowered by such adversaries was not only no part of a soldier's duty, but would be an act

of egregious folly. With this knowledge of the native character, he is sent with a small detachment of twenty-odd men two or three miles from the main body of his regiment. While there he sees natives manifesting, by their expressions and demeanor, more than their usual unfriendliness, and he sees women of the native village near which he is stationed being conveyed away in boats which return filled with men. He not unnaturally recognizes that such things are the very things that the natives would do if they were contemplating an attack. He recalls that it was just such a small detachment as the one of which he was then a part that was rushed and butchered at Balangigi. He is apprehensive of danger, which apprehension he makes known to his superior officer. Because of this apprehension he loads his rifle when sent to his post that Sunday afternoon. While walking his post he sees two bolomen approaching him; he crosses the road to avoid coming in contact with them. They leave their path and come toward him, and when within a short distance of him one displays a bolo and the two together rush at him; he believes he is in danger. What man of sense, in the light of the foregoing, would not have believed himself in danger? And, under the impulse of self-preservation and in the fulfillment of a manifest soldier duty, he fires two shots in rapid succession and kills these two natives. His commanding officer, unduly anxious to concede jurisdiction to the civil courts, inquires if the civil court desires to take cognizance of the affair, which that court declines to do. The matter is then investigated by the military authorities; all the natives in that vicinity are questioned and all deny knowledge of any of the facts relating to the case; he is then tried by court-martial, duly and lawfully created, and is acquitted. But the natives don't approve of the court-martial and complain of the result, and proceedings are instituted before the Court of First Instance. At that trial it is urged that Grafton has been tried once for this offense, and that plea is overruled. He then asks for a jury of his

peers, suggesting that he is an American citizen, brought to the islands without his volition; that his Government was created by the Constitution; that that same Constitution gave to him this right, and that his Government was in a position to accord to him this right because it was there in power. This appeal is likewise overruled. Then the prosecution brings forward two of the natives, who three months before and within ten days of the shooting had declared that they knew nothing of the matter, and they are put upon the stand and tell a tale that bears every mark of the apocryphal; and on their testimony the judge finds that these two witnesses, with erratic memories, do not tell the truth in certain particulars, yet from their testimony he deduces the conclusion that the bolo-wielding native and his companion were brandishing the weapon and rushing Grafton in a spirit of playfulness—to perpetrate a practical joke, to frighten the soldier and have fun with the Americano. Of course it appeared that Grafton did not know these men, and consequently could not have had a knowledge of their extraordinary notions of a jest, or that rushing at a stranger with a drawn bolo was only a phase of Visayan pleasantry, and not unnaturally supposed that they were trying to kill him, and simply did to them what they apparently intended to do to him, but did it first. This judge also found that Grafton was in the discharge of a military duty; that he was at the post where his orders placed him; that he acted without malice and in good faith; but because his judgment was so bad as not to recognize Filipino fun when masquerading as a murderous assault, and not to see that a drawn bolo was the modern bauble of the licensed jester, he adjudged that Grafton should be sent to the penitentiary for twelve years.

On the appeal to the Supreme Court of the Philippines one American judge with three of his Filipino brethren joined against their three American associates to sustain this infamous judgment.

Is this a tale that can be told with pride by any American or thought of with satisfaction by any American judge?

We will continue to hope, as long as we are permitted to do so, that the judgment complained of will not be permitted to stand.

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No. 358.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

The military charge was violation of the sixty-second article of war, which subjects to trial by court-martial—

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline.

The specifications were the felonious killing of the two Filipinos. The approval of the findings by the commanding general states that Grafton was "found not guilty of manslaughter in violation of the 62nd article of war."

The civil charge was assassination—that is, murder in the first degree, for the killing of Villanueva.

The conviction in the Court of First Instance was for homicide under article 404 of the Code, without the extenuating circumstances set forth in article 8, but with the suggestion that the act was committed in a state of great mental excitement (sec. 7, art. 9). The sentence was imprisonment for twelve years and one day. The conviction was affirmed, the dissenting judges finding the homicide justifiable within paragraph 4 of article 8.

General Carfer testifies (p. 10) that he told the military officers not to order a court-martial until he had offered to submit the case to the Court of First Instance, which he apparantly did. But Mr. Ross, the prosecuting officer, testifies (p. 11) that on the day after the shooting he filed a complaint charging assassination, before a justice of the peace at Iloilo (see Philippine Act of August 10, 1901, 1 Pub. Laws, p. 527); that two orders of arrest were issued (which were evidently ineffective), and that then the information in the Court of First Instance was filed. Whatever this preliminary situation may have been, which is not clear, the military authorities did not suspend the court-martial proceedings in accordance with the usual practice, but went on and tried and acquitted the defendant. Villanueva and Castro were killed July 24, 1904; Grafton was arraigned on the military charge August 16, 1904, and was acquitted the same day. That finding was approved by the reviewing authority August 25, 1904. The civil complaint was filed in the Court of First Instance November 28, 1904.

I.

The Acquittal by Court-Martial was no Bar to the Civil Prosecution.

The precise point has never been adjudged by this court. (*Ex parte Mason*, 105 U. S., 696, 699.)

The military and civil jurisdictions are not mutually exclusive. It is not the case of competing civil judicatures seeking to punish for the same offense. An officer or soldier is bound to be a good citizen, and therefore he is liable to the same punishment as any other citizen for a given act. He owes peculiar obligations to the particular corporation of which he is a member, and if he commits a breach of these obligations, whether his act is punishable by the civil magistrate or not, he is punishable by military law. The military tribunal takes cognizance of the offense against the military organization and discipline; the civil tribunal of the crime against the whole community. There are two offenses; that is, different criminal qualifications of the same act. "The Articles of War do not punish forgery or libel as such, but they may punish the same act as a breach of military law or discipline." (6 Op. A. G., 413, 419).

Military law is an exceptional code, applying to a limited class of persons in given relations and not derogating from the general law of the land. The established doctrine is that an officer or soldier of the Army who commits an act anywhere within the territorial jurisdiction of the United States which is criminal both by the military and the general law,

is subject to trial by the latter in preference to the former. An act punishable by the laws of the land is to be punished according to those laws; that is, by the competent ordinary tribunals of the State or Territory in which the offense was committed.

Our Articles of War are based on the British mutiny acts, which have always provided in terms or in substance that they shall not be construed to exempt any officer or soldier whatsoever from being proceeded against by due course of law. (4 Geo. IV, c. 81, sec. 17; 3 and 4 Will. IV, c. 5, sec. 45; 3 and 4 Vict., c. 37, sec. 5.)

> Soldiers are, equally with all other classes of citizens, bound to the same strict observance of the laws of the country and the fulfillment of all their social duties, and are alike amenable to the ordinary civil and criminal courts of the country for all offenses against those laws and breach of those duties. It follows, therefore, that no crime for which the common or statute laws of the country have provided a punishment is cognizable before a court-martial. Nor can the military power interfere to prevent the punishment of any soldier guilty of such offenses, or supersede by any judicial procedure in a court-martial the ordinary effects of the laws of the cou try, unless in those extraordinary cases in which the legislature may find it necessary to proclaim martial law. (Tytler, Essay on Military Law, pp. 153, 154.)

See also Winthrop's Mil. Law, 2d ed., pp. 124, 396, 1076.

Except in time of war (art. 58) an officer or soldier accused of a capital crime or of any offense against the person or property of any citizen punishable by the laws of the land is to be surrendered to the civil magistrate upon application duly made by or on behalf of the party injured (art. 59). The test is the *charge*, which here was murder, and not the grade fixed by final conviction in the civil court, or the name which the military authorities must necessarily give the offense if they assume jurisdiction.

> For any act of homicide, however justifiable it may be, and although done strictly in the line of duty within the United States, and in time of peace, an officer or soldier of the Army is subject to trial by the civil authority. The Articles of War explicitly require that any officer or soldier *accused* of a capital crime or of having used violence against the person of any citizen of the United States such as is punishable by the known laws of the land, shall, on due application, be delivered over to the civil magistrate for trial. * * * If indicted, therefore, and demanded for trial, a soldier in the case supposed must be given up for trial, whether in California or in Oregon [then a Territory]. (7 Op., 561.)

Practically, as to all acts of ordinary violence committed within the interior of the Army the civil authority leaves to the military complete and exclusive jurisdiction and does not interfere to embarrass and obstruct. But a felony is distinguishable whether committed within or without the Army.

In the case of murder an application can not be made on behalf of the party injured, and it is the right of the State, on behalf of the society injured in his person, to move the courts to apply the laws of the land to the criminal.

The foregoing statement of principles is drawn largely from Mr. Cushing's discussion of the "Civil Responsibility of the Army." (*Steiner's case*, 6 Op., 413; see also *Howe's case*, id., 506.)

Steiner, an assistant surgeon of the Army, killed Major Arnold, commandant of Fort Graham, in Texas, at the post in 1853. Steiner was indicted in the State court, and was enlarged on bail pending trial. Meanwhile a court-martial was ordered to assemble on the charges of mutiny and breach of arrest. Mr. Cushing held that it was the duty of the general commanding to aid the political authority of the State in bringing the accused to trial on the pending indictment; that so long as the accused is not in the actual custody of the civil authorities, he is amenable to the military authorities for the military offenses; that it was expedient for the military authorities to suspend the trial of the military relations of the accused until the civil relations of that act shall have been tried by the civil magistrate; and that—

> The trial of Steiner by the civil authorities, whether it result in his acquittal or his conviction, can not be pleaded in bar on his arraignment before a court-martial. The punishment of his crime *civiliter* is no answer to the Articles of War.

In Howe's case the accused, a captain in the Army, killed a private soldier by cruelly beating him while on march in the Territory of Florida in 1839. In April, 1840, he was court-martialed upon the charge of cruel conduct, with the proper specifications, and pleaded in bar an indictment for manslaughter for the same offense in the Supreme (or Superior) Court of the Eastern District of the Territory of Florida. The court-martial proceedings were then suspended until the decision of the civil court should be known. In 1841 Howe was acquitted by the Territorial court, and then the court-martial proceeded and the accused pleaded this acquittal in bar as well as not guilty. The court-martial found him guilty on some of the charges, and sentenced him to be suspended from rank, pay, and emoluments for a year. Mr. Cushing held:

> It is clear that the offences charged against Captain Howe were offences against the laws of the United States for the government of the Army, and that the special pleas pleaded by the accused before the court-martial were not sufficient in law to oust the jurisdiction of that court. * * * I feel constrained to say that in my opinion there is no shadow of legal cause in fact or in law to declare the sentence of this court [the court-martial] void *ab initio*, and no rightful cause or authority to review or reverse the decision for alleged error. (6 Op., 512, 516.)

In the course of the latter opinion Mr. Cushing said:

> Assault and battery and homicide are violations of the municipal laws of the place where committed, to be tried and punished by the proper tribunal of the State or Territory whose peace was broken and laws offended. But the same acts being done by an officer or soldier of the Army of the United States, over and above the breach of the local law, is a breach also of the law of the United States, a violation of the rules and articles for the government of the Army of the United States. * * * In such case the offender is punishable both as a citizen subject to the municipal law of the place and also as a soldier or officer subject to the military law of the United States.
>
> Such double accountability to two different jurisdictions and to different and double punishments for the same act, making two different offenses, is settled to be lawful by the decisions of the Supreme Court of the United States. [Citing *Moore* v. *The People of the State of Illinois*, 14 How., 20; *Fox* v. *The State of Ohio*, 5 How., 434, 435; *United States* v. *Marigold*, 9 How., 569.]

See also *United States* v. *Amy*, opinion by Mr. Chief Justice Taney, reported in *Negro Ann Hammond* v. *The State* (14 Md., 135).

Another case may be cited here. Lieutenant Maney killed Captain Hedberg at Fort Sheridan, Ill., in 1893. Maney was turned over to the civil authorities and was tried in the United States Circuit Court for homicide and acquitted. Subsequently he was

brought to trial before a court-martial at Fort Snelling, Minn., for the same act. Previous to arraignment before the court-martial he applied to the United States Court for a writ of prohibition, which was denied (61 Fed. Rep., 140). It was held that a military court has jurisdiction to try a homicide under a charge of "conduct to the prejudice of good order and military discipline," and under that jurisdiction had authority to go to the merits and pass upon all matters of defense, including a plea of former jeopardy, without interference by any other court. The military trial then proceeded, and the special plea of former trial was set up. The plea was overruled and the accused pleaded not guilty. Being convicted under some of the specifications, he was sentenced to be reprimanded. Judge-Advocate-General Lieber, reviewing the case, comments as follows:

> This plea was properly overruled. It is a sound principle that an officer or soldier of the Army who has been subject to a civil trial for an act of crime remains amenable to trial by court-martial for such purely military offense against the discipline of the service as may have been involved in his act. * * * By the punishment awarded, the court has crowned a grave and important trial by a sentence so trivial and disproportionate to the offenses charged and established as to bring reproach upon the authority by which the trial was ordered, and to compromise the military service.

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These proceedings were submitted to the Acting Secretary of War on August 3, 1894, and the following is recorded as the action of the President in the case:

> By direction of the President, after a full and careful examination of the evidence and proceedings in this case, the findings of the court under the first charge, and the sentence, are hereby disapproved.
>
> JOSEPH B. DOE,
> *Assistant Secretary of War.*

In view of these strictures of the reviewing authorities, the comment seems just that a military trial for the gravest offense may result in a total failure of justice.

The case is not published, but the record of course is open to inspection on the files of the War Department. (Art. 113.)

Moore v. *Illinois* (14 How., 13), which Mr. Cushing finds conclusive in Steiner's case, involved an act of Illinois which punished the harboring or secreting of negro slaves, and an act of Congress which punished those who interfered with the master in recapture and reclamation. The defendant was indicted and convicted under the Illinois statute, the validity of which was called in question in this court as in conflict with the act of Congress. The court said:

> Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction

> of the laws of either. The same act may be an offense or transgression of the laws of both. * * * Yet it can not be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other. (Citing *Fox* v. *Ohio* and *United States* v. *Marigold*.)

As to the "*dictum* of Mr. Justice Woodbury in a previous case" (*Wilkes* v. *Dinsman*, 7 How., 89123), that action was civil, and the question was as to the admissibility of the proceedings of a court-martial. The court states that such proceedings were not conclusive on the plaintiff, "though a bar to subsequent indictments in courts of common law for the same offense." An examination of that case and of the authorities cited shows that the remark was altogether *obiter*, and it was so characterized, with expressions of deference, in *United States* v. *Cashiel* (Fed. Cas., 14744).

In *Ex parte Mason*, 105 U. S., 696, the court distinguishes between the civil and military offence inhering in the same act, and adds:

> Whether, after trial by the court-martial, he can be again tried in the civil courts, is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction.

In *United States* v. *Clark* (31 Fed. Rep., 710) Judge Brown, afterwards Mr. Justice Brown of this court, thus begins his opinion:

> In view of the fact that this was a homicide committed by one soldier, in the performance of his alleged duty, upon another soldier, within a military reservation of the United States, I had at first some doubt whether a civil court could take cognizance of the case at all. But as crimes of this nature have repeatedly been made the subject of inquiry by civil tribunals, I have come to the conclusion that I ought not to decline to hear this complaint. Indeed, it is difficult to see how I could refuse to do so without abdicating that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity. [Citing Tytler upon Military Law; *United States* v. *Cornell*, 2 Mason; *United States* v. *Carr*, 1 Woods, 480; Attorney-General Cushing's opinion in *Steiner's case*.]

On the ground that there was no doubt that the deceased was killed by the prisoner under the performance of a supposed obligation to prevent his escape by any means in his power, and that there was an entire absence of malice, Clark was discharged. But as to the finality of the acquittal by the court of inquiry, Judge Brown said:

> In this connection it is urged by the defence that the finding of the court of inquiry acquitting the prisoner of all blame is a complete bar to this prosecution. I do not so regard it. If the civil courts have jurisdiction of murder,

notwithstanding the concurrent jurisdiction by court-martial of military offences, it follows logically that the proceedings in one can not be pleaded as a bar to proceedings in the other; and if the finding of such court should conflict with the well recognized principles of the civil law, I should be compelled to disregard it.

In *Coleman* v. *Tennessee* (97 U. S., 509) the ground of decision ousting the jurisdiction of the State court was that the murder was committed and the conviction by court-martial adjudged in time of war in the enemy's country under section 30 of the act of Congress of March 3, 1863 (12 Stat., 736), now paragraph 58 of the Articles of War.

The opinion, however, says:

> But the section does not make the jurisdiction of the military tribunals exclusive of that of the State courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by State courts. It simply declares that the offenses shall be "punishable," not that they shall be punished by the military courts; and this is merely saying that they may be thus punished.
>
> Previous to its enactment, the offenses designated were punishable by the State courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exer-

> cised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.

It is then laid down that since under the doctrine of The Exchange (7 Cr., 139), an army marching through a friendly country by permission of its sovereign is exempt from its civil and criminal jurisdiction, *a fortiori* would an army invading an enemy's country be exempt; that the territory of Tennessee was enemy's country until long afterwards, and that while the defendant's plea of former conviction by court-martial was not a proper plea because it admitted the jurisdiction if it were not for the former conviction, the court would give effect to the objection thus irregularly raised by holding that the State court had no jurisdiction at all to try and punish the offense.

In *United States* v. *Cashiel* (Fed. Cas., 14744; 1 Hughes, 552), the civil jurisdiction was sustained after conviction by a court-martial. Although it was time of war, the authority of that case is not overruled by *Coleman* v. *Tennessee*, because it was not enemy's country (Maryland), and the civil jurisdiction was in the Federal and not the State court.

"The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act

may be an offense against two statutes." (*Morey* v. *Commonwealth*, 108 Mass., 433, cited in *Carter* v. *McClaughry*, 183 U. S., 365, 395.) The principle is the same when the same act is an infraction of a municipal ordinance and a penal offense against the sovereign. (*United States* v. *Cruikshank*, 92 U. S., 542; *Moore* v. *People*, 14 How., 17; *United States* v. *Barnhart*, 22 Fed. Rep., 285; *State* v. *Taylor*, 133 N. C., 755, 759, 760; *Abbott* v. *State*, 75 N. Y., 602; *Campbell* v. *People*, 109 Ill., 565.)

In 3 Op., 749, there was a plea in bar of having been tried in a Territorial Supreme Court on the charge of manslaughter (apparently *Howe's case*, 6 Op., 506).

> I am quite clear the plea in bar of *autrefois acquit* is not good, the offense which is the subject-matter of the second trial being altogether different from manslaughter, viz, unofficer-like or ungentleman-like conduct, to be punished according to the eighty-third article of war [now sixty-first].

All these authorities seem to point unerringly to the conclusion that when a man stands in the particular dual relation of criminal liability to a court-martial and to the civil courts he may be punished by each without involving double jeopardy, and that no distinction can be drawn between different offenses against different sovereigns and different offenses against the same sovereign.

Finally, the military authorities establish the foregoing doctrines as a matter of existing practice.

> A former conviction or acquittal of an act, by a civil court, is not a good plea in bar before a

> court-martial on charges and specifications covering the same act. (Benét, Military Laws and Courts Martial, 100.)
>
> Where an officer or soldier having been acquitted or convicted of a criminal offense by a civil court is brought to trial by a court-martial for a military offense involved in his criminal act, he can not plead "a former trial" in the sense of this article (art. 102). * * *
>
> Where an officer who had killed a superior officer in an altercation at a military post was brought to trial before a civil court on a charge of murder, and acquitted, and was subsequently arraigned before a court-martial for an offense against military discipline involved in his criminal act: *Held*, that a plea of former trial interposed by him was properly overruled by the court. (Digest Opinions of the Judge-Advocates-General of the Army, par. 306, 309, p. 92.)

The converse is certainly true, and the Judge-Advocate so holds:

> So where the trial for the military offense has preceded, he can not plead *autrefois acquit* or *convict* to an indictment for the civil crime committed in and by the same act. (Id., par. 306, *ut sup.*)

As to the other points involved, the State may proceed without an application on behalf of the injured person:

> The article [fifty-eighth] is directory, not jurisdictional. It does not limit the action to be taken by the military authorities to cases where the application is made by the

injured party or in his behalf. It does not place a soldier who has committed a crime and been indicted therefor beyond the reach of the civil power, if the person injured does not apply for his surrender. In a case—one of murder, for example—where there can be no personal application, the State properly takes the place of the individual. * * * and upon its demand it is the duty of the commanding officer to surrender the party charged. (Paragraph 102, p. 38, Dig. Op., J. A. G.)

The military *charge* is not conclusive and exclusive on jurisdiction:

> A crime which is in fact murder and capital by statute of the United States or of the State in which committed can not be brought within the jurisdiction of a court-martial under this article by charging it as "manslaughter, to the prejudice," etc., or simply as "conduct to the prejudice," etc. If the specification or the proof shows that the crime was murder and a capital offense, the court should refuse to take jurisdiction or to find or sentence. If it assume to do so, the proceedings should be disapproved as unauthorized and void. (Id., par. 148, p. 48.)

II.

The Court of First Instance had Jurisdiction.

However the case may stand as between national and local jurisdiction, civil or criminal, over a reservation of the United States in one of the original

States or in a State subsequently admitted, there is no doubt of the plenary power of Congress anywhere in a Territory. (*United States* v. *Cornell*, 2 Mason, 60; *People* v. *Godfrey*, 17 Johns., 225; *Commonwealth* v. *Young*, Brightly (Pa.), 302; 7 Op., 571; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S., 525; Mr. Justice Miller in *United States* v. *Stahl*, 1 Woolw., 192—a case of murder in a military post—and in *United States* v. *Ward*, id., 1; *Painter* v. *Ives*, 4 Nebr., 122; *Marion* v. *State*, 16 id., 349; 20 id., 233; *McCracken* v. *Todd*, 1 Kans., 148; *Clay* v. *State*, 4 Kans., 49; *United States* v. *McBratney*, 104 U. S., 621; *Ex parte Crow Dog*, 109 U. S., 556; *United States* v. *Kagama*, 118 U. S., 375; *In re Wilson*, 140 U. S., 575; *Murphy* v. *Ramsay*, 114 U. S., 15; *Mormon Church* v. *United States*, 136 U. S., 1.

The question simply is, What has Congress done? In the case of Indians and Indian country Congress has specifically legislated on the subject.

> The jurisdiction of the United States over these reservations and the power of Congress to provide for the punishment of all offenses committed therein, by whomsoever committed, are not open questions. * * * And this power being a general one, Congress may provide for the punishment of one class of offenses in one court and another class in a different court. There is no necessity for and no constitutional provision compelling full and exclusive jurisdiction in one tribunal; and the policy of Congress for a long time has been to give only a limited jurisdiction to United States courts. (*In re Wilson, ut sup.*)

But Congress has not enacted any special laws regulating the jurisdiction over crimes committed on a military reservation in a Territory, whether committed by military persons or not. Congress has provided for the punishment of certain crimes when committed in any place or district of country "under the exclusive jurisdiction of the United States." (Sec. 5339, R. S., *et seq.*) On the other hand, Congress has organized Territorial governments and created courts possessing complete civil and criminal jurisdiction, without restriction as to locality, and has empowered Territorial legislatures to enact codes of law subject to revision by Congress. (R. S., Title XXIII, c. 1, 2, especially secs. 1851, 1868, 1895, 1910, 1925; 7 Op., 561.)

There are, it is true, two sides to those courts, because they are clothed with the jurisdiction of Circuit and District Courts of the United States in all cases arising under the Constitution and laws of the United States. (Sec. 1910, R. S.; *Ex parte Crow Dog*, 109 U. S., at p. 560; *Ex parte Gon-Shay-Ee*, 130 U. S., 343, 348.) But that provision only emphasizes the fact that the contest here is not between the two *judicial* jurisdictions of the same sovereign, but between the judicial jurisdiction and the executive and military jurisdiction.

As to a Territory at large, the Supreme Court of Colorado said in *Franklin* v. *United States*, 1 Colo., 35:

> It appears to us that Congress has always acted in the belief that a Territory of the United States is not a place or district of

> country under the sole and exclusive jurisdiction of the United States within the meaning of the law under consideration. An examination of the laws of the United States respecting the Territories discloses the theory upon which Congress has always acted, which is that in the exercise of its undoubted right to govern the Territories, that body, deeming it inconvenient or inexpedient to provide municipal laws for the Territories, directly and by its own act erected Territorial governments and delegated to them authority to enact such laws. [Citing *Leitensdorfer* v. *Webb,* 20 How., 176.]

As between the two judicial jurisdictions there are only two cases closely in point, and it does not appear in them that the murder was committed by an officer or soldier, although it was committed on a military reservation. In *Scott* v. *United States,* 1 Wyo., 40, the Federal jurisdiction was sustained without opinion. In *Burgess* v. *Montana,* 1 L. R. A., 808, *Scott* v. *United States* was disapproved, and the Territorial jurisdiction sustained on the ground that the governments and courts of the Territories were created by Congress, that Congress had not restricted the jurisdiction of the local courts, or reserved exclusive jurisdiction in the Federal courts, and that section 5339 did not apply. The language of that opinion is:

> The reservation of a given portion of the public domain for military purposes by the United States in no way interferes or conflicts

with the extension and operation of the local law and the jurisdiction of local courts over the military reservation. In this respect there may be, and doubtless is, a divided jurisdiction, the United States occupying the reservation for military purposes only, while the local government occupies it for the purpose of civil government and the administration of its laws. * * * The jurisdiction of the United States over a military reservation is not exclusive, and does not deprive the Territorial laws and courts of the jurisdiction conferred on them by law.

In 7 Op., 561, 564, Mr. Cushing said:

> I doubt whether a homicide committed within what is a mere military or other reservation in an organized Territory comes within the general provision of the act of Congress as to the punishment of crimes by Federal law. Such reservation is not a place "ceded" to the United States in the apparent sense of the act [act of March 3, 1825, 4 Stat., 115]—that is, ceded by a State. It is under the jurisdiction of the United States, to be sure, in the same sense that the rest of the Territory is, and is excluded from preemption and entry, but is not under the jurisdiction of mere Federal courts in the sense of that act.

As the point has not been conclusively adjudged, there might be a question in this court, if the case arose in an organized Territory, whether the Federal or local court had cognizance. But if *any* civil court under the authority of the United States has cognizance, the military jurisdiction as exclusive is ousted

and the opposing claim might as well be advanced in a case like Cornell's, where the murder was of a soldier by a soldier at Fort Adams, in Newport Harbor. I suppose that in the organized Territories, as in the States, the military authorities do not assert this exclusive jurisdiction, but commonly turn offenders over to the civil authorities in case of murder or any other grave crime, whether the crime was committed by a military person or a civilian. Yet the courts of the organized Territories, both on the Federal and Territorial sides, are mere legislative courts and, however different as to jurisdiction and in other respects, are not courts of the United States in the sense of the Constitution any more than the Philippine courts, which also rest upon the plenary power of Congress.

The propositions, then, are:

Congress has created the Territorial courts and authorized and approved their general civil and criminal jurisdiction.

Congress has not distinguished between crimes committed by or against military persons, or between crimes so committed on or off a military reservation.

Congress, in defining and punishing crimes subject to exclusive Federal jurisdiction, had in mind the case of a Federal reservation in a State, and not the case of a Territory in general or of a reservation within a Territory.

As Congress has exclusive jurisdiction everywhere in a Territory, to be exercised as it sees fit, and has made no exception regarding a military reservation, where the jurisdiction of the United States is neither

more nor less exclusive than elsewhere in the Territory, it would seem that Congress intends the jurisdiction over ordinary crimes to be exercised universally by the local courts. It is worthy of note on this point, as showing the same preference, that Congress has expressly sent into the local courts certain grave crimes committed by Indians in a Territory, whether on or off a reservation. It required the express provision in that case, because of the Indian relations and the previous laws. (Sec. 9, act of Mar. 3, 1885; 23 Stat., 362, 385; Kagama case, 140 U. S., at pp. 376, 377, 383.)

Congress has not conferred upon the military tribunals in time of peace in the Territories or elsewhere any such jurisdiction as claimed. On the contrary, the rule of surrender to the civil authorities is controlling wherever in the United States or its Territorial possessions the army may be, and the inference is that Congress means the general principle to prevail,which except in time of war and in enemy's country, prefers the civil to the military tribunals.

It is not as if there were no competent civil judicature in the Philippines established by the legislature, or as if the legislature had conferred exclusive jurisdiction upon the military tribunals. The power of the Crown in England in the absence of legislation is complete, and while the power of the Executive here does not extend so far, there might be some reason for the argument advanced, if the Executive had sought to confer exclusive jurisdiction upon the military tribunals, or if Congress and the Philippine leg-

islative authority had not acted. Compare the case of Gibraltar, a mere isolated military post in a foreign land. (*King* v. *Suddis*, 1 East, 306, in which it was admitted on behalf of the prisoner that "the King had a military power to try offenders of this description at Gibraltar in the absence of all civil judicature at that place.") Compare also the power of courts-martial (in 1840) under an act of Parliament at places beyond a certain distance from the presidencies of Fort William, Fort St. George, and Bombay. (3 and 4 Vict., c. 37, sec. 2.)

But the present case is not one where there are no civil courts or, as yet, only native tribunals. The Courts of First Instance in the Philippines are not native courts. They are courts of competent jurisdiction established and existing under the authority of the United States.

During the war and insurrection in the Philippines there was at first a suspension of the civil courts. They were gradually restored with their former jurisdiction, first on the civil and then on the criminal side. This restoration took place under the military government; and section 109 of General Orders 58 (1 Public Laws Phil. Com., Appendix, pp. 1082, 1095) provides that from the date of that order the ordinary civil and military tribunals each within its proper limits shall have exclusive jurisdiction over all crimes with which any person within the islands may be charged. Until the military government terminated the jurisdiction over crimes committed by military

persons anywhere was naturally reserved in the military tribunals.

The judiciary act of June 11, 1901 (1 Phil. Laws, 252, 262), gave the courts of first instance jurisdiction in all criminal cases in which the penalty is more than six months' imprisonment or a fine exceeding $100 (sec. 56). The civil jurisdiction of the provost courts was withdrawn by that act (sec. 78), and their criminal jurisdiction, except over purely military offenses, was withdrawn, at first in Manila (act of August 5, 1901, sec. 3; id., 375), and on May 16, 1902, throughout the islands except in districts exclusively under military control (act No. 400, sec. 2, id., 963).

The civil government has passed laws in aid of the military authority (act of September 3, 1903, act of April 28, 1904, 3 Phil. Laws, pp. 9, 327), respecting the execution of military sentences, and the appearance of civil witnesses before courts-martial. The act of November 24, 1902 (2 Phil. Laws, 157) defines the jurisdiction of the civil and military authorities, respectively, over military reservations. It contains various provisions in aid of the military control of the reservation for military uses, but asserts plainly the civil jurisdiction so far as it does not interfere with military administration or use.

Sections 3, 7, and 8 of that act are as follows:

> SEC. 3. No branch of the civil government in force on or over any public lands reserved by the President for military purposes, and no civilian residents thereon, shall interfere

with military administration or the use of such lands for military purposes.

SEC. 7. No arrest of any officer, soldier, or civilian employee in the military service of the United States on any military reservation, camp, or barracks, shall be made except on warrant in due form in writing and served upon the commanding officer thereof.

SEC. 8. All laws or parts of laws in force in the Philippine Islands not inconsistent with military use of any public lands reserved by the President for military purposes shall be in full force and effect over said lands.

Thus it appears that the military jurisdiction, which was universal at the outset, has been gradually restricted and withdrawn, first by the military authorities themselves before their government terminated, and then by enactments of the Commission. Coupled with that cessation of the military régime is a specific provision of the legislature giving to the civil government jurisdiction over military reservations for all purposes consistent with military use; so that there is no substantial distinction between the case of a military reservation in the Philippines and in an organized Territory of the United States.

The Philippine government act of July 1, 1902 (32 Stat., 691), provided (sec. 9):

> That the Supreme Court and the Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to

> the power of said government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law.

(See Kepner *v.* United States, 195 U. S., at pp. 114–119.)

Section 86 of that act directs that all laws passed by the Philippine government shall be reported to Congress, and reserves the power to annul the same. The attitude of Congress to the organized Territories is similar (sec. 1850, Rev. Stat.); and thus it would seem that the exercise of local jurisdiction over a reservation in the Philippines is valid until and unless disapproved by Congress.

The attorney-general of the Philippines has held that the reservation of lands in the Philippine Islands for military purposes by the President of the United States merely subjects said lands to the proprietary control of the National Government. It does not have the effect of withdrawing them from the operation of the laws passed by the Commission, nor from the jurisdiction of the regularly constituted authorities. (1 Op. Atty. Gen. P. I., p. 326; id., 332; Official Gazette, vol. 4, No. 5, p. 61.)

The order of reservation herein was issued under section 12 of the act of July 1, 1902, which provides as follows:

> That all the property and rights which may have been acquired in the Philippine Islands

> by the United States under the treaty of peace with Spain, signed December 10, 1898, except such land or other property as shall be designated by the President of the United States for military and other reservations of the Government of the United States, are hereby placed under the control of the government of said islands, to be administered for the benefit of the inhabitants thereof, except as provided in this act.

The order of reservation was dated September 1, 1903 (War Dept., G. O. No. 34, October 13, 1903) and "reserved for military purposes subject to private rights, pursuant to section 12 of the act of Congress approved July 1, 1902. * * * 7. For the military post and reservation at Camp Jossman, near Buena Vista, Guimaras Island: (*a*) All public lands included within boundaries described as follows [giving the metes and bounds]; (*b*) All public lands included within boundaries described as follows [giving the metes and bounds]."

It is to be assumed, I suppose, in the absence of any clear indication in the record, that this is the order of reservation, and the tracts reserved include the property and buildings at the Buena Vista landing where this crime was committed.

It is clear that no reservation of exclusive jurisdiction can be claimed under this order.

In an opinion dated December 10, 1906 (26 Op., —) the Attorney-General held as to the naval reservation at Subig Bay in the Philippines, where the language of the order was that the lands were reserved for

naval purposes, and said reservation and "all lands included within said boundaries are placed under the *governance and control* of the Navy Department," that the military jurisdiction did not exclude any civil and judicial powers of the Philippine government which did not interfere with the naval uses of the reservation.

In the Draper case (164 U. S., 240) the enabling act of Montana provided that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;" but the court rejected the inference sought to be drawn from that language of exclusive jurisdiction in the courts of the United States.

In an organized Territory for offenses against the laws of the United States process runs in the name of the United States (*In re Wilson*, 140 U. S., 575, 576, 579), and it seems that the rule should be the same for offenses against the laws of the Territory, although the practice is otherwise. "It must be confessed that this practice exhibits somewhat of an anomaly. Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the Government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States." (*Snow* v. *United States*, 18 Wall., 317, 321.) The practice in the Philippines has conformed to the rule thus laid down, but the

distinction would seem to be largely matter of form and not especially significant or controlling upon any of the fundamental principles now involved.

In the Colley case (3 Official Gazette, 62) the crime was committed and the accused convicted during the insurrection, and therefore the case was within article 58, and the military jurisdiction exclusive and final. In 24 Op. A. G., 570 (Captain Brownell's case), it was held that for a criminal offense committed during the insurrection the military jurisdiction was exclusive, and that the offense not having been then and thus tried, a court-martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer, now that peace has been proclaimed in the Philippines.

Concluding, under this branch of the case also it is found that the existing military law of the United States holds that territorial courts take jurisdiction of a crime committed on a reservation.

> The provisions of the article [fifty-ninth] are applicable only when the officer or soldier is accused of a crime or offense "which is punishable by the laws of the land;" that is, by the laws of the particular State or Territory or of the United States or by the common law as recognized in the State or Territory. (Dig. Op. J. A. G., par. 96, p. 36.)
>
> The term "any of the United States" employed in this article, *held* properly to include any and all the political members of our governmental system, and to embrace an organized Territory equally with a State. (Id., par. 101, p. 38.)

The officers and soldiers of the Army within a Territory are subject to its criminal laws equally with its citizens, except where the enforcement of such laws would obstruct the operations of the United States. (Id., par. 2437, p. 687.)

A territorial statute is operative upon a military reservation within the Territory so long as it does not conflict with the laws of the United States or with the military administration or legitimate operations of the Government. (Id., par. 2439, p. 687.)

III.

Grafton was not Entitled to be Indicted by a Grand Jury or Tried by a Petit Jury.

It is well settled that a State is not bound by the limitations of the Constitution of the United States expressly relating to or affecting this subject. Due process of law does not necessarily require an indictment by grand jury in a prosecution by a State. (*Hurtado* v. *California*, 110 U. S., 516.)

"The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either." (*Maxwell* v. *Dow*, 176 U. S., 581, 604, and auth. cit.)

In *Hawaii* v. *Mankichi* (190 U. S., 197), it was held that until the Constitution was formally extended to the Hawaiian Islands, the criminal pro-

cedure theretofore in force in those islands continued under the resolution of Congress which did not substitute the common law proceedings by grand and petit jury.

And finally, in *Dorr* v. *United States* (195 U. S., 138, 149), approving the opinion of the court in the Mankichi case and the concurring opinion of Mr. Justice White, it was held that—

> The power to govern territory, implied in the right to acquire it and given to Congress in the Constitution in Article IV, section 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not without legislation and of its own force carry such right to territory so situated.

But the claim is made that because the defendant was in the Philippines in pursuance of his duty by virtue of military orders, the decision in the Dorr case does not apply. On this point the Supreme Court of the Philippines in another case well says (Record in *Carrington* v. *United States*, No. 597 of the present term, p. 15):

> Let us suppose, therefore, that the accused was sent by order of the President of the United States to a certain State in which there was no provision as to trial by jury, and that while there he broke the laws of that State: Could

> he insist in the courts of that State, where there was no provision made for jury trials, that he be tried by jury according to the Constitution of the United States, which does not rule nor has any application in said State? In our opinion when a citizen, whether a member of the United States Army or no, goes to a certain State or Territory of the Union and breaks the laws thereof, he is subject to be judged in accordance with the rules established in said State or Territory, so long as the system of procedure in force in said Territory or State be of a just and impartial character.

Anyone who violates law is to be tried by the law violated, which is *a fortiori* when an officer and citizen of the United States violates a law of one of the possessions of the United States.

In re Ross (140 U. S., 453) held that an American seaman could be punished for murder by the consular court in Japan without a jury trial. The seaman, although an alien, was clothed *pro hac vice* with all the qualities of a citizen under the law. He was entitled to the protection and benefits of the acts of Congress on behalf of American seamen, and was subject to all their obligations and liabilities. He was thus held to be within a law which subjected to trial by the consular court "all citizens of the United States charged with offenses against law committed in" Japan (secs. 4083, 4084, R. S.). He took the burden with the benefits, of course, but he had the status of a citizen. Now the language of the Secretary of State, approved in that opinion, makes it

clear that a seaman in the mercantile service is in an organized national service governed by a special and complex system of law. His case is assimilated to that of a soldier during his enlistment.

It is to be remarked, then, that each can enlist in his service or not as he chooses, but having enlisted, one as much as the other is bound to go where the orders of his superiors send him under his contract and the law. Both are subject to the law of the place as provided or approved by the national authority.

It is also to be remarked (on another point in the case) that the Ross decision shows, as above indicated, that no objection can be predicated on the literal restriction of the fifty-ninth article of war to "any offense against the person or property of any *citizen* of any of the United States." "Reading the treaty and statute together in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the Government;" citing among other authorities 1 Hale's Pleas of the Crown, page 542, where it is said of a statute punishing robbery of the "King's subjects," "though it speaks of the King's subjects, it extends to aliens robbed; for though they are not the King's natural born subjects, they are the King's subjects when in England by local allegiance." (140 U. S., at pp. 475–476.)

It would seem that the native inhabitants of the Philippines are entitled to the care and protection of

the Government at least as much as alien seamen in our mercantile service, and therefore that they are within an equitable extension of the language of article 59.

The just conclusion is that while citizens and others within the United States are entitled to trial by jury in criminal cases arising under the Constitution and laws of the United States, neither citizens nor others, whether in the military service or not, are so entitled before a tribunal created by or under the authority of the United States, either in a foreign country or in a territorial possession of the United States. (140 U. S., at p. 464, citing *Cook* v. *United States*, 138 U. S., 157, 181.)

Finally, if soldiers in the Philippines are to be tried in accordance with the constitutional provisions, but other citizens and the native inhabitants have no such rights, there would seem to be a violation of the guarantee of equal protection of the laws. (Sec. 5, Philippine government act.)

IV.

Grafton was not in the Performance of his Military Duty and is not Justifiable.

The facts are expressly found by the trial court, and the Supreme Court does not materially revise the findings. It is found there was no "rush" and no intention to rush, although the two Filipinos, ignorant of the fatal risk, were probably playing on the unfounded suspicions and evident appre-

hensiveness of the sentry. The killing of Castro is necessarily part of the *res gestæ* here, and the finding is that he was shot through the side, not in front. An aggressor at the supreme moment of attack does not come on sideways. Villanueva was unarmed, and the sentry knew it. He instantly desisted from his so-called advance and fled. Grafton, though observing this, slipped another cartridge into his rifle and shot his victim as he was crouching against the wall of the storehouse, which stopped further flight.

This was not the case of an escaping felon. In such a case, however, where it was doubtful whether the deceased was in reality attempting to escape arrest or had surrendered, the court noted the concession that if he had it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by Federal law. (*Drury* v. *Lewis*, 200 U. S., 1, 8.)

Blackstone states the fundamental distinction:

> And as the manner of the defense, so is also the time to be considered; for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge and not defense. (4 Bl. Com., 185.)

Unless the accused has reasonable ground of apprehension at the time, the justification of self-defense will fail, it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the

party entertaining such fears in killing the other party by way of precaution if there be no actual danger at the time. (1 East P. C., 272; *State* v. *Scott*, 4 Ired., 409; *State* v. *Harris*, 4 Jones, 190; *Dill* v. *State*, 25 Ala., 15; *Dyson* v. *State*, 26 Miss., 362; *Holmes* v. *State*, 23 Ala., 24; *Carroll* v. *State*, 23 id., 33.)

While the rule has been laid down that a person free from fault "may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense" (1 East P. C., 271), the courts have held that the rule applies only where real danger still exists and where the aggressor is retreating in order to gain advantage so as to renew the conflict; and that even in the most extreme cases the right to pursue and kill a retreating assailant ceases as soon as the necessity for defense has ceased and the danger is no longer immediate and impending. (*Morgan* v. *State*, 67 S. W., 420, 424; *Johnson* v. *State*, 50 S. W., 343, 345; *People* v. *Hecker*, 109 Cal., 451, 463; *Luckinbill* v. *State*, 52 Ark., 45, 47; *Oregon* v. *Conally*, 3 Oreg., 69, 72.) In the case last cited the court charged the jury that—

> The law of self-defense does not justify one in following up his adversary after the immediate danger has ceased and then killing him. Such a law would make every man his own avenger.

In *Beard* v. *United States* the attack was continuing; there was no retreat (158 U. S., 550).

In *Allen* v. *United States* (150 U. S., 551), the accused was struck and thrown down and committed the homicide in the heat of the struggle.

In *Rowe* v. *United States* (164 U. S., 546, 557), the accused, after attacking slightly and then being attacked fiercely in turn, killed his assailant. The court say:

> If the accused did in fact withdraw from the combat and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard* v. *United States*.

"Deliberation" is a relative term. "While it may be psychologically true that in every sane act, with whatever swiftness performed, there is involved the prior determination to do it, often unappreciably separated in time, yet when the defense in a case of homicide is justification or excuse or action *in hot blood*, the question is one of fact and must be passed on by the jury in view of all the circumstances developed in evidence uninfluenced by metaphysical considerations proceeding from the court." (*Allen* v. *United States*, 150 U. S., 551, 561.)

The act was deliberate here, because Grafton knew or ought to have known under the circumstances that he need not shoot again. If he had time to load, he had sufficient time to pause and

reflect. The dissenting opinion concedes that this is clear now. Practically, as well as legally, it was just as clear at the moment to a trained soldier held to a high degree of self-control and responsibility as well as alertness. Indeed, he was bound to a higher degree of care than an ordinary reasonable and prudent man, and this killing, by any one, was unnecessary if not wanton.

I submit that the judgment below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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No. 358.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 358.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the United States, and moves the court to advance the above-entitled cause on the docket and set it down for hearing on a day convenient to the court during the present term.

On July 24, 1904, Homer E. Grafton, a soldier in the Army of the United States, while on guard as sentinel at Buena Vista, on the island of Guimaras, near Iloilo, Philippine Islands, shot and killed two natives, Florentino Castro and Felix Villanueva, who were passing along a highway crossing the military reservation. After trial and acquittal by a court-martial, Grafton was arrested and tried for the killing of Villanueva

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only, in the Court of First Instance for the Ninth Judicial District, charged with the crime of assassination. He was found guilty of homicide and sentenced to imprisonment for twelve years and one day. He appealed to the Supreme Court of the Philippine Islands, by which court the judgment was affirmed, and thereupon sued out this writ of error.

The questions raised in the case are whether the defendant, because of his prior trial by a court-martial, has been twice put in jeopardy for the same offense; whether he was entitled to a jury trial; whether the civil courts of the Philippine Islands had jurisdiction to try a soldier for an act claimed to have been done in the performance of military duty; and whether the act, claimed to have been committed without malice and in the honest and reasonable belief that the defendant was discharging his duty as sentinel, constituted homicide in violation of article 404 of the Penal Code of the Philippine Islands.

Opposing counsel concur in this motion.

It is suggested that the second Monday of March would be satisfactory to counsel for the hearing of the case.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

No. 358.—October Term, 1906.

Homer E. Grafton, Plaintiff in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[May 27th 1907.]

Mr. Justice Harlan delivered the opinion of the Court.

The writ of error brings up for review a judgment of the Supreme Court of the Philippine Islands, affirming a judgment of the Court of First Instance in the Province of Iloilo, by which the plaintiff in error, Grafton, was adjudged guilty of homicide as defined by the Penal Code of the Philippines, and sentenced to imprisonment for twelve years and one day.

The history of this criminal prosecution, as disclosed by the record, is as follows:

Homer E. Grafton, a private in the Army of the United States, was tried before a general court-martial convened in 1904 by Brigadier General Carter, commanding the Department of the Visayas, Philippine Islands, upon the following charge and specifications: "Charge: Violation of the 62nd Article of War: Specification I. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Florentino Castro, a Philippino, by shooting him with a U. S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P. I., July 24th 1904. Specification II. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Felix Villanueva, a Philippino, by shooting him with a U. S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P. I., July 24th 1904."

By the 58th Article of War it is provided: "In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or district in which such offense may have been committed."

The 62d Article of War is in these words: "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court martial, according to the nature and degree of the offense, and punished at the discretion of such court."

The accused pleaded not guilty to each specification as well as to the charge. At the trial he made the following admission in writing: "I admit that on July 24th, 1904, I was a member of a detachment of Company G, 12th Infantry, on duty at Buena Vista Landing, Guimaras, P. I.; that on July 24th, 1904, I was regularly detailed on guard and was a member of the first relief. That I was on post between the hours of 2 and 4 p. m. In the execution of my duty I shot two male Philippinos with a U. S. magazine rifle, caliber .30."

The court found the soldier not guilty as to each specification and not guilty of the charge. His acquittal was approved by the Department Commander on August 25th 1904 and he was released from confinement and restored to duty. It appeared in proof that the accused was of excellent character; and it is stated in the opinion of the Supreme Court of the Philippines that, before holding the court-martial, the department commander offered to submit the case to the Court of First Instance of the Province, but it did not appear what action was taken by the judge of that court in reference to that offer.

On the 28th day of November 1904 the Prosecuting Attorney of the Province of Iloilo, Philippine Islands, filed a criminal information or complaint in the name of the United States, in the Court of First Instance of that Province, as follows: "The subscriber accuses Homer E. Grafton of the crime of assassination, committed in the manner following: That on the 24th of July, 1904, and in the barrio of Santo Rosario, within the jurisdiction of the municipality of Buena Vista, Guimaras Island, province of Iloilo, Philippine Islands, the said accused, with illegal intention and maliciously and without justification and with treachery and deliberate premeditation killed Felix Villanueva in the manner following: That on said day and in said barrio the said accused, Homer E. Grafton, with the rifle that he carried at the time, known as the United States magazine rifle c. .30, fired a shot directly at Felix Villanueva, causing with said shot a serious and necessarily fatal wound, and in consequence of said wound the aforesaid Felix Villaneuva died immediately after the infliction thereof, in violation of the law."

When the above information was filed, as well as when the court-martial convened, the Philippines Penal Code provided as follows:

"Art. 402. He who shall kill his father, mother, or child, whether legitimate or illegitimate, or any other of his ascendants or descendants or his spouse, shall be punished as a parricide, with the penalty of *cadena perpetua* to death.

"Art. 403. He who, without being included in the preceding article, shall kill any person, is guilty of assassination if the deed is attended by any of the following circumstances: (1) With treachery; (2) For price or promise of reward; (3) By means of flood, fire, or poison; (4) With deliberate premeditation; (5) With vindictiveness, by deliberately and inhumanly increasing the suffering of the person attacked. A person guilty of assassination shall be punished with the penalty of *cedena temporal* in its maximum degree to death.

"Art. 404. He who, without being included in the provisions of article 402, shall kill another without the attendance of any of the circumstances specified in the foregoing article is guilty of homicide. A person guilty of homicide shall be punished with the penalty of *reclusión temporal.*"

At the trial in the Court of First Instance the accused interposed a demurrer, alleging that that court had no jurisdiction to try him for the offense charged for the following reasons: The acts constituting the alleged offense were committed within the limits of a military reservation of the United States and by a soldier duly enlisted in the Army of the United States, in the line of duty; the Court of First Instance of the Philippine Islands had no jurisdiction of the persons of officers or enlisted men of the United States Army for offenses committed by them in the performance of military duty; such courts were not constitutional courts as contemplated by the 3d Article of the Constitution of the United States, and were without jurisdiction to try causes of which such constitutional courts have exclusive jurisdiction; the courts of the Philippine Islands could not deprive the accused of his constitutional privilege of trial by jury; and no court other than a military tribunal, constituted by the authority of the United States, could try the accused upon an indictment which had not been found or presented by a grand jury.

The demurrer also stated that if the court held that it had jurisdiction to try the accused, then he pleaded, in bar of the proceedings against him, the judgment of the general court-martial acquitting him of the offense of which he was found guilty in the Court of First Instance.

The demurrer and plea were both overruled, the trial court holding that it had jurisdiction to try the accused and that the plea of jeopardy based on his trial by court-martial was insufficient, in that the military court could not legally have taken cognizance of the crime of assassination charged in the information, but only of a violation of the 62d Article of War.

A trial was then had in the Court of First Instance before the judge thereof, without a jury, and resulted in a judgment declaring Grafton guilty of "an infraction of article 404 of said Penal Code, and of the crime of homicide, in killing the said Felix Villanueva, at the time and place and in the manner hereinbefore stated, and in view of the extenuating circumstances before remarked upon, he is sentenced by the court to imprisonment in such prison as the law directs, for the term of twelve years and one day, it being the minimum term of the minimum degree of *reclusion temporal* which is the penalty for homicide, and to pay the costs of the prosecution, and to suffer all the other accessories of said sentence." The case was carried to the Supreme Court of the Philippines, where the judgment was affirmed by a divided court. The plea of double jeopardy was overruled by that court and three of the seven judges were of opinion that, under the facts proven at the trial, the accused should have been acquitted.

The principal contention of the accused is that his acquittal by the court-martial forbade his being again tried in the civil court for the same offense. He bases this contention, in part, upon that clause of the Fifth Amendment of the Constitution, providing, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" and, in part, upon the act of Congress of July 1st 1902, providing temporarily for the administration of the affairs of civil government in the Philippine Islands, and which act declared that "no person for the same offense shall be twice put in jeopardy of punishment." 32 *Stat.* 691. That the prohibition of double jeopardy is applicable to all criminal prosecutions in the Philippines was settled upon full consideration in the recent case of *Kepner* v. *United States*, 195 *U. S.* 100, 124, 126, 129, 130, in which it was held that by force of the above act of Congress such prohibition was carried to the Philippines and became the law of those Islands. In the same case it was said—what may be repeated as applicable to the present case—that "this case does not call for a discussion of the limitations of such power, [the power of Congress] nor require determination of the question whether the jeopardy clause became the law of the Islands after the ratification of the treaty without Congressional action, as the act of Congress made it the law of these possessions when the accused was tried and convicted."

We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance. In *Ex parte Reed*, 100 *U. S.* 13, 23, the court,

referring to a court-martial, said: "The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court."

In *Ex parte Mason*, 105 *U. S.* 696, 699, the question arose whether a court-martial could lawfully sentence an officer of the Army, charged with the offense of attempting to kill a prisoner in the custody of the United States, to be imprisoned at hard labor in the penitentiary. The accused was tried under the 62d Article of War. The court said: "He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether, after trial by the court martial, he can be again tried in the civil courts is a question we need not now consider. It is enough if the court martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction." It was objected, in that case, that the sentence was in excess of what the law allowed. The court referred to the 97th Article of War, which provided that "No person in the military service shall, under the sentence of a court martial, be punished by confinement in a penitentiary, unless the offence of which he may be convicted would, by some statute of the United States or by some statute of the State, Territory or District in which such offence may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such imprisonment." It then proceeded: "Under this article, when the offence is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true when the offence, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act charged as 'conduct to the prejudice of good order and military discipline' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a court martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial

to the good order and discipline of the army to which he belonged. The sixty-second article provides that the offender, when convicted, shall be punished at the discretion of the court, and the ninety-seventh article does no more than prohibit the court from sentencing him to imprisonment in a penitentiary in a case where, if he were tried for the same act in the civil courts, such imprisonment could not be inflicted." In *Carter* v. *Roberts*, 177 *U. S.* 496, 498, which was a case of the punishment under the judgment of a general court martial of an officer of the Army, the court, after observing that every officer, before entering on the duties of his office, subscribes to the Articles of War enacted by Congress and places himself within the power of courts martial to pass on any offense which he may have committed in contravention of them, said: "Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." This language was repeated in *Carter* v. *McClaughry*, 183 *U. S.* 365, 380.

It thus appears to be settled that the civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier, if such court had jurisdiction to try the offense set forth in the charge and specifications; this, notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts.

We are now to inquire whether the court-martial in the Philippines had jurisdiction to try Grafton for the offenses charged against him. It is unnecessary to enter upon an extended discussion of that question; for, it is entirely clear that the court-martial had jurisdiction to try the accused upon the charges preferred against him. The 62d Article of War, in express words, confers upon a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, jurisdiction to try "all crimes" not capital, committed in time of peace by an officer or soldier of the Army. The crimes referred to in that Article manifestly embrace those not capital, committed by officers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the above Article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature. While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only

concurrent with that of the civil courts. Of such offenses courts-martial may take cognizance under the 62d Article of War, and, if they first acquire jurisdiction, their judgments cannot be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the military court.

We are next to inquire whether having been acquitted by a court-martial of the crime of homicide as defined by the Penal Code of the Philippines, could Grafton be subjected thereafter to trial for the same offense in a civil tribunal deriving its authority, as did the court-martial, from the same government, namely, that of the United States? That he will be punished for the identical offense of which he has been acquitted, if the judgment of the civil court, now before us, be affirmed, is beyond question, because, as appears from the record, the civil court adjudged him guilty and sentenced him to imprisonment specifically for "an infraction of Article 404 of said Penal Code and of the crime of homicide."

It was said by the trial judge that the offense *charged* against Grafton in the civil court was "assassination," which offense, he said, was punishable under section 403 of the Philippines Penal Code by death, and of which crime the military court could not, under the Articles of War, have taken cognizance; whereas, the offense for which he was tried by court-martial was only homicide as defined by section 404 of the Penal Code. But if not guilty of homicide as defined in the latter section of the Penal Code—and such was the finding of the court-martial—he could not, for the same acts and under the same evidence, be guilty of assassination as defined in the former section of the Code. Looking at the matter in another way, the above suggestion by the trial judge could only mean that simply because, speaking generally, the civil court has jurisdiction to try an officer or soldier of the Army for the crime of assassination, it may yet render a judgment by which he could be subjected to punishment for an offense included in the charge of assassination, although of such lesser offense he had been previously acquitted by another court of competent jurisdiction. This view is wholly inadmissible. Upon this general point the Supreme Court of the Philippines, referring to the defense of former jeopardy, said: "The circumstance that the civil trial was for murder, a crime of which courts martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the defense on this theory. The identity of the offenses is determined, not by their grade, but by their nature. One crime may be a constituent part of the other. The criterion is, Does the result of the first prosecution negative the facts charged in the second? It is apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of jeopardy."

The offense, homicide or manslaughter, charged against Grafton was the unlawful killing of a named person. The facts which attended that killing would show the degree of such offense, whether assassination of which the civil court might take cognizance if it acquired jurisdiction before the military court acted, or homicide of which the military court could take cognizance if it acted before the civil court did. If tried by the military court for homicide as defined in the Penal Code, and acquitted on that charge, the guaranty of exemption from being twice put in jeopardy of punishment for the same offense would be of no value to the accused, if on a trial for assassination, arising out of the same acts, he could be again punished for the identical offense of which he had been previously acquitted.

In *Chitty's Criminal Law, vol.* 1, *pp.* 452, 455, 462, the author says: "It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge upon an indictment for manslaughter upon the same person, because the latter charge was included in the former, and if it had so appeared on the trial the defendant might have been convicted of the inferior offense; and, on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for if he were innocent of the modified crime he could not be guilty of the same fact, with the addition of malice and design." Mr. Bishop, in his *Treatise on Crim. Law* (7th *ed.*) § 1050, says: "It is not necessary to establish the defense 'autrefois acquit' or 'convict' that the offense in each indictment should be the same in name. If the transaction is the same, or if each rests upon the same facts between the same parties, it is sufficient to make good the defense." In *Commonwealth* v. *Roby*, 12 *Pick.* 503, the court said: "Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and, *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder. 1 *Stark. Cr. Pl.* (3*d edit.*) 322."

It must, then, be taken on the present record that an affirmance of the judgment of the civil court will subject the accused to punishment for the same acts, constituting the same offense as that of which he had been previously acquitted by a military court having complete jurisdiction to try and punish him for such offense. It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses—

one against military law and discipline, the other against the civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed—and that a trial for either offense, whatever its result, whether acquittal or conviction, and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the other offense. We cannot assent to this view. It is, we think, inconsistent with the principle, already announced, that a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public. The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102d Article of War (which is the same as Article 87, adopted in 1806, 2 *Stat.* 369) declares that "no person"—referring, we take it, to persons in the Army—"shall be tried a second time for the same offense." But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. Congress has chosen, in its discretion, to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done the judgment of such military court was placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb. Any possible conflict in these matters, between civil and military courts, can be obviated either by with-

holding from courts-martial all authority to try officers or soldiers for crimes prescribed by the civil power, leaving the civil tribunals to try such offenses, or by investing courts-martial with exclusive jurisdiction to try such officers and soldiers for all crimes, not capital.

In support of the view that the judgment of a military court against an officer or soldier of the Army for acts constituting a crime against both the civil law and the military organization, is no bar to a second trial in the civil courts for the same acts, we are referred to *Fox* v. *Ohio*, 5 *How.* 410, 435; *United States* v. *Marigold*, 9 *How.* 560, and *Moore* v. *State of Illinois*, 14 *How.* 13, 19, 20. Nothing said or determined in either of those cases conflicts with the decision in this case. In the above cases, especially in *Moore's case*, the question was mooted whether the same acts could be treated as crimes both against the United States and a State. It was there suggested that a person could not be punished by two governments on account of or for the same act constituting crime, without violating the Fifth Amendment. But this court, speaking by Mr. Justice Grier, said: "An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence. Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox* v. *The State of Ohio*, (5 How. 432,) that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and, in the case of the *United States* v. *Marigold*, (9 How. 560,) that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States."

It is clear that the cases above cited are not in point here. The Government of the United States and the governments of the several States in the

exercise of their respective powers move on different lines. The Government of the United States has no power, except such as expressly or by necessary implication has been granted to it, while the several States may exert such powers as are not inconsistent with the Constitution of the United States nor with a republican form of government and which have not been surrendered by them to the General Government. An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a State can be punished only by its authority and in its tribunals. The same act, as held in *Moore's* case, may constitute two offenses, one against the United States and the other against a State. But these things cannot be predicated of the relations between the United States and the Philippines. The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that Territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same Government—that of the United States.

It may be difficult at times to determine whether the offense for which an officer or soldier is being tried is, in every substantial respect, the same offense for which he had been previously tried. We will not therefore attempt to formulate any rule by which every conceivable case must be solved. But passing by all other questions discussed by counsel or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902 and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that Territory. This is sufficient to dispose of the present case.

The judgment must be reversed, and the case remanded with directions to the Supreme Court of the Philippines to order the complaint or information in the Court of First Instance to be dismissed and the plaintiff discharged from custody.

It is so ordered.